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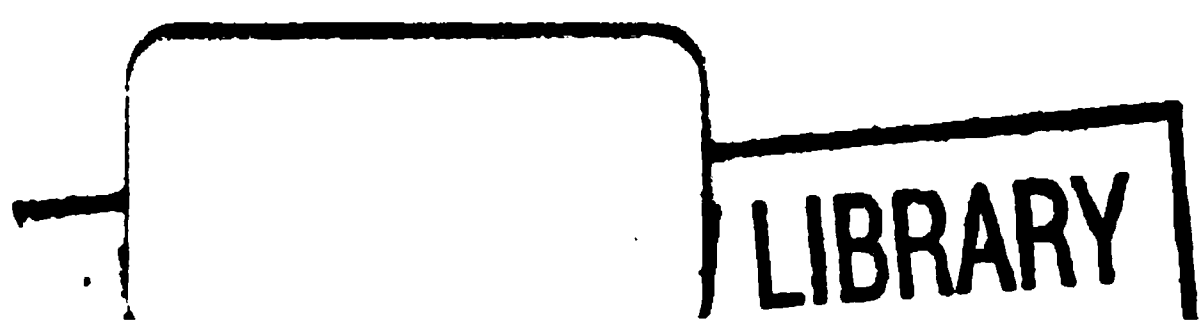
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N. Y. SUPREME
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Copyright, 1900,
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(Patent applied for.)

32614

16

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

New York (State)
SUPREME COURT,

OF THE

STATE OF NEW YORK.

BY ABRAHAM LANSING,
COUNSELOR-AT-LAW.

VOLUME 1.

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P R E F A C E.

Prior to the action of the legislature in 1869, there had been no legislative provision for the separate official publication of the decisions of the Supreme Court of this State. The duties of State reporter, under the old system, embraced the publication of decisions in the court for the correction of errors, as well as in the Supreme Court, and they were given to the public in the same volumes.

The vast and unprecedented jurisdiction, both original and appellate, conferred upon this court by the system organized upon the constitution of 1846, and the multiplicity and importance of the causes, arising in the constantly increasing population and business of the State, would seem to have demanded some express provision for authentic reports of its adjudications, and the subject must at an early day have received attention from the law-making power, had not the efforts of individuals been put forward to supply the want.

The law of 1869 provides for the appointment of a reporter for the Supreme Court, and for the delivery to him of the decisions therein, which are designed to be reported.

My appointment under this law, bears date in the middle of June last, and this volume of reports, delayed far beyond the time originally set for its publication, by causes which I have been unable to control, is given to the public in discharge of duties thereby devolved on me.

I submit its pages to the profession, in the hope and belief, that the experience gained in the preparation of this volume, will enable the reporter, in future efforts in the same direction, to improve upon this.

ABRAHAM LANSING.

ALBANY, *March* 30, 1870.

JUSTICES OF THE SUPREME COURT

DURING THE YEAR 1869.

First District :

THOMAS W. CLERKE.† DANIEL P. INGRAHAM.
JOSIAH SUTHERLAND. ALBERT CARDOZO.
GEORGE G. BARNARD.

Second District :

JOHN A. LOTT. JASPER W. GILBERT.
JOSEPH F. BARNARD.† ABRAHAM B. TAPPEN.

Third District :

THEODORE MILLER.† HENRY HOGEBOOM.
CHARLES R. INGALLS. RUFUS W. PECKHAM.

Fourth District :

AMAZIAH B. JAMES. PLATT POTTER.
ENOCH H. ROSEKRANS.† AUGUSTUS BOCKES.

Fifth District :

WILLIAM J. BACON.† JOSEPH MULLIN.
HENRY A. FOSTER. LEROY MORGAN.

Sixth District :

WILLIAM MURRAY, JR. DOUGLASS BOARDMAN.
RANSOM BALCOM.† JOHN M. PARKER.

Seventh District :

CHARLES C. DWIGHT.† THOMAS A. JOHNSON
E. DARWIN SMITH. JAMES C. SMITH.

Eighth District :

CHARLES DANIELS. GEORGE D. LAMONT.
RICHARD P. MARVIN.† GEORGE BARKER.

JOHN R. BRADY, CALVIN E. PRATT, CHARLES H. DOOLITTLE and JOHN L. TALCOTT succeeded Justices CLERKE, LOTT, BACON and LAMONT, respectively, whose terms of office expired with the year 1869.

The judges whose names are marked thus † were the presiding justices. Justices LOTT, JAMES, MURRAY and DANIELS sat in the Court of Appeals during 1869, and Justice LOTT became a judge of that court from that time. Justices SUTHERLAND, INGALLS, FOSTER and E. D. SMITH are now sitting in the Court of Appeals.

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CASES ADJUDGED

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

**SAMUEL C. BOWEN, Respondent, v. ALBERT W. POWELL and
CHARLES GORDON, Appellants.**

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1869.)

The complaint averred a contract with L., as the defendants' agent; L. verified the answer, and recited in the affidavit of verification his agency for the defendants in making the contract.—*Held*, the affidavit was inadmissible as evidence of L.'s agency in making the contract.

The defendants did not, by obtaining a standing in court, through L.'s verification, become bound by the recitals in the affidavit, as having been authorized or adopted by them.

APPEAL from judgment on report and decision of a referee. The referee found that the defendants, early in October, 1865, by their agent, or agents, agreed with the plaintiff to purchase of him 1,000 barrels of apples, at the price of \$5.70 a barrel. The apples were, from time to time, delivered and accepted, amounting in all to 1,047 barrels, and the referee decided that the defendants were liable to pay the contract price for all the apples delivered. He credited the amount paid and found a balance of \$833.76, including interest.

The defendants claimed that they purchased only 445 barrels at \$5.70 a barrel, and the remainder at \$4.50 a barrel.

Bowen v. Powell.

Numerous exceptions were taken by the defendants during the trial, and to the report and decision of the referee.

Bowen & Pitts, for the appellants.

Sickles, Graves & Childs, for the respondent.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court—MARVIN, P. J. I think the judgment cannot be disturbed upon the ground that the material facts found were against evidence. The controlling facts were sharply litigated upon the trial, and there was evidence upon both sides.

The counsel for the defendants has presented in his points only a portion of the exceptions taken upon the trial.

The plaintiff claimed that the contract was made with Augustus M. Ives, as agent for the defendants. The answer of the defendants was verified by Ives. In the affidavit of verification, Ives says "he is the agent for the defendants in the matters out of which this cause of action, as claimed by the plaintiff, arose, and is acquainted with and has personal knowledge of all the material allegations contained in the defendants' answer. That as such agent he made the contracts upon which the apples in controversy were delivered. That he has heard read the foregoing answer, &c. The reason of his making the affidavit is that the defendants are non-residents of the county, and neither is present to make the same.

For the purpose of proving that Ives was the lawfully constituted agent of the defendants, the plaintiff's counsel offered to read in evidence this affidavit verifying the complaint. To this, a sufficiently specific objection was made. The referee overruled the objection and the defendants excepted. The affidavit was read. The referee erred in admitting this evidence. It was a fact to be established by the plaintiff that he made the contract with the defendants, or with some per-

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son authorized by the defendants to enter into the contract for them.

The affidavit was not common law evidence. It was not competent evidence to prove the fact of agency. Upon the issue of agency, it was no more than the declaration of Ives that he was agent, and the declarations of the agent are never competent to prove the agency.

The authorities cited by counsel for plaintiff are not in point. In *Green v. Givan* (33 N. Y. R., 343, 367), the answer was put in evidence to prove certain admissions. This was the answer of a person who had since died and the action was revived and continued, and the point made was that the admissions made in the answer were not admissible against the defendants succeeding, and this was very properly overruled for the reason stated in the opinion. The case has no application to the present case.

In *Morrell v. Canoley* (17 Abbott, 76), it was the verification of the defendant that was read in evidence, to prove a fact stated in it. Of course, this was admissible simply as the declaration or confession of the defendant, and was common law evidence.

The difficulty is not overcome by the suggestion that the Code, § 157, authorizes the verification of a pleading to be made by an agent, and that the defendants, by the act of Ives, obtained a standing in court, and, therefore, they should be held to have adopted his act and to have admitted that all he stated was true. It would be dangerous to adopt this train of reasoning. It may be that, for the purposes of the action, it should be held that the defendants were bound by the act of verification. But the Code does not require that the agent who makes the verification should have had any connection with the facts out of which the action or defense arose. He may have a personal knowledge of all the material facts of the pleading, and still never have been an agent of the party until employed about the prosecution or defense of the action.

The proof of the agency of Ives was the verification of the

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answer, and, thereupon, the plaintiff proceeded to examine witnesses as to conversations between the plaintiff and Ives, tending to prove a contract or contracts, and in this he erred.

Many objections were made and some exceptions were taken, but I do not deem it necessary to examine them here, as the cause must be again tried, and we are to assume that the rules of evidence will, upon such trial, be properly administered.

Judgment reversed and a new trial ordered, costs to abide event.

JOHN M. HOLLIS, Respondent, v. WILLIAM WAGAR, Appellant.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1860.)

When the entire damages, claimed to have resulted from the negligent performance of specific services, are sought to be inferred, and estimated, from proof of negligence, and of its nature and extent, in respect to a part of the services, the inference and estimate must be made by the jury.

Accordingly, a witness having testified, that he had re-dug a part of a field of potatoes, which had been dug by plaintiff on contract, and had found a certain quantity of potatoes still in it; and the dimensions of the field being given, was asked how many bushels of potatoes had, in his judgment, been left in the ground by plaintiff.—*Held*, that the question, assuming a test of damages, and calling for the opinion of the witness, was properly overruled.

There being some evidence of an acceptance and promise to pay, for services rendered on special contract, a request to charge the jury, that if they find that the services were not performed in a workmanlike manner, they must find for the defendant, is properly denied. The most that defendant can claim in such case is to recoup damages.

PLAINTIFF brought suit in a Justices' Court on a special contract for work, labor and services in digging a field of potatoes. The answer was a general denial, and an allegation that the potatoes were dug in an unworkmanlike manner. The justice rendered judgment for plaintiff; and the defendant appealed to the County Court. The jury in the County Court found a verdict for plaintiff; and the defendant further

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appealed to this court. The facts out of which the exceptions to the rejection of testimony and refusal to charge arose, are fully stated in the opinion.

G. Robertson, Jr., for the appellant.

Francis Rising, for the respondent.

Present—MILLER, INGALLS and HOGEBROOM, JJ.

By the Court—MILLER, P. J. Upon the trial of this case, the defendant introduced a witness who testified that after the field of potatoes had been dug over by the plaintiff, he went into the north part of the field, dug two rows, about twelve rods, and filled a bushel basket with potatoes which the plaintiff had left in the ground. That there were from two to three or from five to six, seven, and sometimes as many as nine potatoes left by the plaintiff in a hill. That the longest way of the field was seventy-five or eighty rods, and that he picked up some potatoes from the field on the north side that were badly cut, and that they were frozen half through. The defendant then offered to show by the witness the damages which he had sustained by reason of the non-fulfillment of the contract, which testimony was objected to as immaterial; the objection sustained, and an exception taken by the defendant. The following question was then put to the witness by the defendant's counsel: "Judging from the portion of the ground you did dig over, and the number of bushels you did get by the re-digging, how many bushels of potatoes were left in the ground by the plaintiff?" The question was objected to by the plaintiff; objection sustained, and the defendant excepted. The witness then further stated that he had dug one hundred hills in various parts of the lot.

I think it is quite evident that the evidence offered was properly rejected. The evidence of the witness showed the extent of the damages which he had proved; and it was by no means difficult for the jury to determine from his testimony their amount. He testified to facts within his knowledge;

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and it was clearly for the jury to decide from these facts, what damages his statement established. The witness had only dug over a very small portion of the field, and he was not better qualified to make a calculation as to how many potatoes were left in the ground than the jury. The offer embraced all damages which the defendant had sustained, while the witness knew only as to part. It called for his opinion upon a question of fact, which it was clearly the province of the jury to decide; and for this reason, also, was inadmissible.

At the close of the trial, and after the judge had charged the jury, the defendant's counsel asked the court to further charge the jury that if they believed from the evidence that the plaintiff agreed to assort and barrel the potatoes, and the plaintiff admitting that he did not do so, they must find for the defendant; the court refused so to charge, and the defendant excepted.

The plaintiff's testimony shows that he did barrel the potatoes, but he denies that he agreed to assort them; and I do not understand that he made an admission that he did not do both. The offer, therefore, was objectionable, because it embraced a proposition which was partially erroneous, and for that reason should have been excluded. It is also liable to objection upon other grounds. There was evidence upon the trial to show that the defendant had expressed himself satisfied; said that the work was done well, and that he had agreed to pay the balance, thus ratifying the contract as executed and carried out. Even if the plaintiff had thus agreed, and afterward modified the contract and promised to pay, the naked proposition of the charge was erroneous, unless qualified by the subsequent modification.

The request to charge the jury, that if they believed the potatoes were not dug in a workmanlike manner the plaintiff could not recover, was properly overruled. As before remarked there was testimony to show a ratification of the contract; a promise to pay after proof of knowledge; which would preclude the proposition presented, from being charged

France v. McElhone.

as a full defense which would prevent a recovery. The most which could be claimed on account of a failure to perform the contract in a workmanlike manner would be a recoupment for damages on that account as the case stood.

I am not entirely satisfied that the charge made was not in substantial accordance with the requests, although not precisely in their language; but I put my opinion upon the grounds stated, which I think are a sufficient answer to the positions taken by the defendant's counsel in this respect.

The judgment below must be affirmed, with costs.

ELTING FRANCE and OLIVER D. FRANCE, Respondents, v.
JAMES McELHONE, Appellant.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1869.)

Whether a written statement of items made by the witness, and verified by his oath on the stand, and which he is ready to verify orally in detail, is not admissible in evidence in the first instance as an account—*Quere.*

In an action to recover the proceeds of sales made by defendant, as agent for the plaintiffs, the defendant having testified to the collection of different amounts for the plaintiffs, and to a settlement at which he paid them a specific sum, is entitled to the benefit of his own testimony as to the completeness of the accounting, and may be asked the general question whether or not he accounted for all the moneys collected for them.

And when such defendant, as a witness, states that he had made deductions from claims collected by him, and was authorized to do so if he thought necessary, and that on his settlement with plaintiffs he was asked by one of them if certain deductions made were necessary in order to collect the claims, and, upon his answering affirmatively, the deductions were allowed, he may, in order to establish the fairness of his transactions, be asked if the deductions made by him, were in fact necessary in order to collect the claims in question.

He may also, in the first instance, show the total amount allowed him in settlements made with one of the plaintiffs, for time and expenses; such allowance, was an admission by plaintiffs of the correctness of the charges, to the benefit of which defendant was entitled. And the error in excluding the testimony will not be disregarded on appeal, because, on his cross-examination, the witness could not state particularly what took place at the settlements.

France v. McElhone.

APPEAL from judgment entered upon a referee's report.

The plaintiffs were manufacturers of scythes, under the firm name of E. France & Son. On the 16th April, 1853, they made with defendant a written contract, by which they appointed him their agent for one year, to procure orders for the sale of, and to sell their scythes. By the terms of this contract, the defendant was to collect the moneys arising from such orders or sales. As a compensation for his services, the contract provided that he should receive two dollars for each day actually and necessarily employed in the business. Also, his traveling expenses necessarily incurred therein, and a commission of one per cent on all moneys collected by him. The contract also provided that the defendant was to advance to the plaintiffs, during the year, moneys, from time to time, not exceeding, however, the sum of \$1,500. It also provided that out of the moneys which the defendant should collect from the sales of scythes, he was to pay unto himself all moneys he might advance to the plaintiffs under the contract, together with his salary, expenses and commissions.

The defendant procured orders and sold scythes under this contract, and on the 23d of December, 1853, the parties had a settlement of their transactions under it. The defendant had made collections for scythes sold; had made payments to the plaintiffs on account of the same, and had loaned to them \$1,500 according to the agreement. Some of the orders remained uncollected. On that settlement the plaintiffs were found indebted to the defendant in the sum of \$809.92.

On the day of that settlement (December 23d, 1853), the plaintiffs made with the defendant a second contract, similar to the first, except that the defendant agreed to advance them from time to time, a sum not exceeding \$1,000.

At the time of making this contract, the plaintiffs indorsed on it the said \$809.92, which was found owing by them on the settlement referred to, as so much received from the defendant.

The defendant during the year following, procured orders and made sales under the said contract. He also made col-

France v. McElhone.

lections after December 23, 1853, on the uncollected orders under the first contract, and also on the orders which he had taken under the second contract. He made various payments to the plaintiffs out of such collections; the most of which were indorsed on the contract. The plaintiffs received from him other moneys, to wit: \$1,623.28, and \$550, which were covered by two receipts. Neither party seems to have done anything under either of these contracts, after 1854. In October, 1859, the plaintiffs commenced this action to recover from the defendant the proceeds of scythes sold by him, under the two contracts referred to. The action was referred, and after trial the referee reported in favor of the plaintiffs for \$1,711.13, with interest after March 23, 1855. The questions raised, so far as material, appear in opinion.

Judgment was entered upon the report, and the defendant appealed to the General Term.

S. W. Fullerton, for the appellant.

M. Schoonmaker, for the respondents.

Present—MILLER, INGALLS and HOGEBOM, JJ.

By the Court—MILLER, P. J. Some of the rulings of the referee, upon the trial of this case border so closely upon the line of the discretion to be exercised by the court, that it is not entirely clear that they were erroneous, and authorize a reversal of the judgment.

I am inclined to think, that the question asking the witness to state the amount of his traveling expenses necessarily incurred by him, in and about the business in which he was engaged, and the number of days actually and necessarily employed by him in and about the same, since December 23, 1853, might lawfully have been allowed. So also the paper containing a statement in detail of the expenses necessarily incurred, and of the time actually and necessarily employed by him in and about the business, might have been admitted,

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and the admission justified; not as the introduction of a paper, but as showing in writing facts the witness could have stated orally in detail, if the examination had been conducted in a manner to draw out such a statement, after looking at the writing, and with the writing in his hands. The paper was not a memorandum, but a statement of time and expenses; an account verified by the oath of the witness on the stand; somewhat, if not entirely, analagous to an account for goods sold, where the proof shows that it has been drawn off on paper, and that the items are correct. Such evidence would not be a memorandum, but a statement prepared from all sources of knowledge at the command of the witness, which would be quite as direct as it would be to call upon the witness, with the paper before him, to read off or to state these items. But the question arising as to the admissibility of the questions put, are somewhat close, and, to some extent, a matter of discretion. I am, therefore, inclined not to regard their rejection as vitally erroneous, and I think the judgment should not be reversed on account of any supposed error in this respect.

There are, however, some decisions of the referee which cannot be upheld, in my opinion, upon any legal grounds.

I think the question put to the defendant whether or not he accounted to the plaintiffs for all moneys collected by him upon orders after December 23, 1853, was improperly overruled. The defendant had testified that he had collected the sum of \$669.09, subsequent to the time named, on the orders which remained uncollected in his hands at that period; that he had collected \$2,458.36 on the sales of 1854, and that he had loaned the plaintiffs, after December 23, 1853, between \$2,700 and \$2,800, including the sum of \$809.92, which was conceded to be due at the time of the settlement. The defendant had also testified that he had a settlement with the plaintiffs shortly after returning from his last collection tour, and that he had paid them the sum of \$1,623.23, for which they gave him a receipt. After proof of these facts, it was manifestly proper for the defendant to show that all the

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moneys in his hands collected upon orders had been paid over and accounted for. The defendant had stated what moneys he had collected, and what he had paid ; and it was no objection to the question that it was leading and general in its character. I think that the defendant had a right to close the door to all cavil or question which might be raised as to the correctness of his statement and the account he rendered. It is true that the defendant, upon his cross-examination, afterward rendered an account of his collections in detail, and he testifies that he took receipts, and that the receipts in evidence cover all the moneys that he has any recollection of. But this does not entirely obviate the difficulty. He was entitled to the benefit of his own evidence that he had accounted for all moneys collected upon orders in a general form ; and it added somewhat to the weight of that already given by him. For the same reasons I think the referee improperly rejected the question put to the defendant whether he had collected any other moneys upon orders since December 23, 1853, than those which he had accounted for to plaintiffs.

I also think that it was proper to prove by the defendant that it was necessary to make the deductions which he did make in order to collect the claims upon parties for indebtedness to the plaintiffs. The witness had previously testified that he had made deductions from some of the orders when making collections ; that he was authorized to do so by the plaintiffs the same as if he was doing it for himself ; that if he thought it necessary to make deductions he might do so ; that he made the statement to the plaintiffs of the deductions made when he was settling, and that one of them, with whom the settlement was made, asked if it was necessary to make the deductions ; that the defendant replied that it was, and the plaintiff said it was right. No objection was made because the question called for the defendant's opinion ; and even if it had been, I think that the question was a proper one. One of the plaintiffs had ratified the action of the defendant in making deductions, and asked his opinion

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if it was necessary ; and, when informed that it was, responded that it was right. In corroboration of the defendant's testimony, and to establish the fairness of his transactions in making the deductions, it was proper to show by him that they were necessary in the general way proposed.

Nor was there any objection to asking the defendant what was the gross amount of deductions made upon orders. If the defendant knew what the gross amount of the deductions was, why exclude his knowledge of that fact? True, he might have stated the details and given the particulars ; but it by no means follows that a neglect to show items in the first instance is a reason for upholding an improper ruling, when the testimony is clearly admissible. The defendant had an undoubted right to show the gross amount of deductions actually made, and was not, therefore, bound to introduce evidence which would establish the same thing by another and a more extended and elaborate course of examination, when the answer to the question put would prove the same fact in a more direct and positive manner.

It was also competent for the defendant to show the total amount which had been allowed him for traveling expenses and time in settlements made with one of the plaintiffs. The defendant had testified to various settlements made ; and that he had been allowed for traveling expenses and time upon these occasions, and he had a right to show what was allowed to him when they were made. Such an allowance would have been an admission of the plaintiffs of the correctness of the amounts allowed, and strong proof in his favor as to this branch of the case.

It is no answer, in my opinion, to the objection made to say that the defendant lost nothing by the rejection of the evidence offered, because, when he was inquired of upon his cross-examination, he could not state particularly what took place at the settlements with the plaintiffs. This testimony might affect the credit to be given to any statement which he might make as to the amount allowed, but it does not render the evidence improper, or establish satisfactorily that

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no injury could have resulted from the rejection of the evidence offered. Nor do the receipts indorsed upon the contract so clearly establish the expenses incurred and their allowance by the plaintiffs, as to authorize the conclusion that the testimony was unimportant and inadmissible.

Other questions are made as to the correctness of the referee's ruling upon the trial, but as for the reasons already stated the report must be set aside; it is not necessary to discuss them.

This case has been twice tried, and it is of some importance to the parties to terminate the litigation; but, after a careful examination, I do not see how the referee's rulings can be sustained upon legal grounds in the particulars stated.

For the reasons given, the judgment entered upon the referee's report must be reversed, and a new trial granted, with costs to abide the event.

THE UNION NATIONAL BANK OF TROY, Respondent, v. THE
SIXTH NATIONAL BANK OF NEW YORK, Appellant.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1869.)

It is, it seems, a sound principle of law, that in an action for money paid by mistake in facts, the plaintiff should recover irrespective of any negligence with which he may be chargeable, unless it has caused injury to the defendant.

Thus, where defendant discounted a note for G. and sent it to plaintiff for collection, and plaintiff sent it to an agent for the same purpose, and remitted to defendant before any return from the agent; and it then transpired that the agent, having presented the note for payment, it had been dishonored by the maker and protested, and notice of protest mailed to the parties entitled, which had been received by defendant and G., though it had not reached the plaintiff; and that G., upon notice of the protest, had repaid defendant for the note; and that defendant, after notice of the protest, and the repayment by G., receiving plaintiff's remittance, had refunded to G., and the note was usurious and uncollectable. In an action brought by plaintiff to recover the amount remitted to defendant, as for money paid by mistake, it failing to appear that defendant had no remedy over against G.—*Held*, the action would

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lie, although plaintiff might be chargeable with negligence in not ascertaining that the note had been dishonored before making the remittance to defendant.

An action could not be sustained by the plaintiff, against G., for the money paid him on receipt of plaintiff's remittance, but G. would be liable to refund to defendant.—*Semble.*

A referee's finding of the non-receipt by a bank, of notice of protest sent to its cashier, is sufficiently supported by uncontradicted testimony thereto, given by one of the bank clerks, whose duties would not necessarily bring to him information of the receipt, although the ground of the clerk's knowledge does not appear.

APPEAL taken upon a case, and exceptions from a judgment in favor of plaintiff entered on a referee's report. The action was to recover money paid by mistake, and the evidence disclosed the following facts :

Plaintiff was collecting agent at Troy, for defendant doing business in New York, and received from it, for collection, a note made by one Bassett, payable to order at the Columbia Bank of Chatham Four Corners, indorsed by the payee and another, and by one Gregan, who was a customer and depositor with defendant, and for whom defendant had discounted the note. Plaintiff forwarded the note for collection to the said Columbia Bank, its agent, which, on the 29th January, 1866, duly presented the note to the maker, by whom it was dishonored, had it protested, and mailed notices of protest to the indorsers, including the cashiers of the parties to this action. The notices reached the defendant and Gregan, and the latter, after receipt thereof, and on the 5th day of February, 1866, repaid defendant for the note. The same day, plaintiff remitted the amount of the note, less commissions, to the defendant, which the latter receiving on the 6th, credited to Gregan in his account, and informed him of the fact; and Gregan, the following day, drew against and received the amount so credited. Gregan had died before this action was commenced.

Defendant's bookkeeper (the ground of whose information did not fully appear) testified to the non-receipt by his bank, of notice of protest at the time the remittance was made, and also, that he had made the remittance supposing the note to

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have been paid. It also appeared, that though there was daily communication by mail, between Troy and Chatham Four Corners, defendant made no inquiries regarding the note until the 9th February, when, upon its inquiring of the Columbia Bank, the note was returned to defendant under protest. The plaintiff received it on the 10th, and on the 12th returned it to the defendant, with notice of the mistake in the former payment, and a claim of repayment.

The note had been afterward assigned by the defendant to the plaintiff, for the purpose of a suit thereon; by the terms of the assignment, their rights and liabilities were reserved to the parties as they stood up to the date of the assignment. Plaintiff sued the maker, who was good, and the payee, but his action had been defeated upon a defense of usury.

Gregan continued to deal with defendant for eighteen months after the repayment to him, and his deposit account during that time averaged from \$1,000 to \$1,500.

I. Paris and *W. H. Peckham*, for the appellant, among other points, insisted: That the action being equitable, founded on an alleged right of plaintiff to be relieved from its own mistake, there could be no recovery unless the mistake was mutual, and related to facts respecting which both parties were mutually bound to inquire, citing, *Bank of Commerce v. Union Bank* (3 N. Y., 230); *Franklin v. Raymond* (3 Wend., 72).

That plaintiff having had knowledge, or the means of knowledge within reach, so that by reasonable diligence he could have acquired information of the facts, he could not recover. (Story Eq., §§ 146, 150, 151.)

And claimed the rule on this point to be as stated per *MARCY, J.*, in *Franklin Bank v. Raymond* (3 Wend., 69), as follows: "The general principle of law is indisputable, that if a party pays money under mistake of the real facts, and *without any negligence* imputable to him *for not knowing them*, he may recover back such money;" citing also the language of *BAILEY, J.*, in *Milnes v. Duncan* (6 B. & C., 671),

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viz. : "If a party pay money under a mistake of the real facts, and there are no *laches imputable* to him in respect of his omitting to *avail* himself of the *means of knowledge* within his power, he may recover it back."

C. F. Tabor, for the respondent.

Present—INGALLS, HOGEBOM and PECKHAM, JJ.

By the Court—PECKHAM, J. This was an action to recover back the money paid by plaintiff to defendant, as proceeds of a note sent by defendant to plaintiff to collect. The plaintiff alleges that the note was not in fact collected, but that the amount was sent by plaintiff by mistake, under the belief that it had in fact been paid, plaintiff having received no notice of its protest.

The answer puts in issue the alleged mistake. After fully stating the facts the judge proceeded as follows: The defendant now insists that there was no proof before the referee that the plaintiff did not receive notice of protest. The plaintiff proved that the note was regularly protested, and notice of protest sent by mail to the plaintiff, addressed to its cashier from the Columbia Bank, where the note was payable. The cashier, to whom this notice was addressed, was not called as a witness; but a bookkeeper of plaintiff, who had no duty or opportunity to know, so far as appears, whether the cashier received such notice, testified "that he never knew of any notice of protest being received by plaintiff," and that "he supposed the note had been paid, because we (the plaintiff) received no notice of protest." His duties, as stated by himself, were "to attend to the remittance of foreign notes; that it was in his exclusive charge to attend to and ascertain what notes were received for collection;" that he "was charged with the collecting and remitting out-of-town paper." This was paper of that character. He also testified that "plaintiff remitted for this note before any notice of protest was received or the note returned."

It certainly does not appear how this clerk should or could

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know whether plaintiff's cashier had received the notice of protest. But he was not cross-examined at all on that subject by the defendant's counsel, and he swears positively to a fact, the non-receipt of a notice, which it is possible he actually knew, and would have disclosed how, had his attention been called to the point. Possibly he received and opened at that time, all letters addressed to the plaintiff's cashier.

Under these circumstances I think the referee was right in his finding on this point; at least it does not affirmatively appear that he was wrong.

It is also insisted by the defense, that the plaintiff was guilty of negligence, in not sooner learning that this note was not in fact paid, and communicating that fact to defendant. The note payable at the Columbia Bank fell due, and was protested, on the 29th of January. On the 5th of February, the plaintiff sent the money to defendant as proceeds of the note. On the 9th or 10th of February, the plaintiff, for the first time, sent to the Columbia Bank to learn about the note, and on the 10th, for the first time, is informed that it was protested, and on the 12th of February the defendant is informed that the money was sent by mistake, and must be repaid. There was a daily mail between plaintiff and Columbia Bank, on the line of a railroad, and the bank was only some thirty miles distant from Troy. Here were some eleven or twelve days suffered to elapse by plaintiff after this note fell due, before it heard or took any steps to learn what had become of the note, whether paid or not, the Columbia Bank in that time sending to plaintiff neither money nor note. This would hardly be regarded as according with prompt business conduct. Still I do not understand that this so-called negligence on the part of the plaintiff will bar his recovery, unless the defendant has suffered thereby. The nature of the negligence is best ascertained by referring to the duty imposed upon plaintiff. Its duty was to collect the note and forward the proceeds promptly; if not paid, to notify parties and return the note. It was not paid, and all proper notices were

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given. The principle, I think, is sound, that the plaintiff should recover back money paid to defendant by mistake, irrespective of that negligence, unless it has caused injury to defendant. Suppose it were held that the plaintiff was negligent or careless in sending proceeds of note to defendant, without any knowledge or notice that it had been paid; I know of no principle of law or equity that would bar a recovery solely on that ground. If the defendant has not in any manner been injured by the neglect, why should it be aided and shielded thereby, from an otherwise just responsibility; in other words, why should a negligence which has injured no one, which has in no manner, in fact, affected the cause of action, be allowed to discharge that cause of action?

The defendant also insists that it paid over the money to Grogan, to whom it then belonged, after receiving it from plaintiff as the proceeds of the note. That this was done before any knowledge or notice of the alleged mistake. The fact is so found by the referee.

There is nothing in the intimation that the defendant paid over the money too soon to its customer, Grogan. That it should have waited and inquired if there was not some mistake before doing so. Such a course is probably never adopted in practice. An indorsed note is sent to a bank for collection, is protested, and in a week thereafter the bank remits the money upon the note as paid. Was it ever heard of that the owner of the note fails or hesitates to use the money or to dispose of it absolutely until he should first send to the bank and inquire if it be really paid? Human experience probably shows no such case. Has he not the best evidence of it in the receipt of the money from the party having it for collection as the proceeds of its payment?

That it had been first protested makes no difference. A protest, followed by a payment in a week thereafter, is not a novelty. Every business man knows this. The only question, then, in my judgment, is, has the defendant sustained any loss by reason of this mistake of the plaintiff? Is the defendant injured? It has paid over the money, but it could sue

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and recover it back from Gregan. He was not insolvent for more than a year and a half after this mistaken payment to him. His subsequent insolvency at his death does not affect the case. By the stipulation to sue parties to the note, it was agreed that the rights of the parties should afterward stand the same as if no suit brought. Thus their rights must be determined as of the time when defendant was notified of the mistake. At that time Gregan's account was large enough to enable defendant to right itself.

It is also said that Gregan had parted with security he had taken on the note after he heard it was paid, and before hearing of the mistake. That is claimed, but neither proved nor found as a fact. The defendant is liable to pay back the money unless it proves that it has no remedy over. That it has failed to do. There are many cases of recovery where the money has been paid over. *Canal Bank v. Bank of Albany*. (1 Hill, 287). That, it is true, was the case of a forged indorsement of the payee's name to a draft upon the plaintiff. The defendant merely acted as agent in collecting, but the defendant, in fact, had no title to it, and could transfer none. It collected the money of the drawee and paid it over to its principal without knowledge or notice of the forgery. It was still held liable. In this case the defendant did not act as agent of any one. It discounted the note for Gregan, and, therefore, owned the note at the time it was sent to plaintiff for collection. I do not see that any action would lie by plaintiff against Gregan on the facts as proved; not upon the note, as that was void for usury; nor for money paid, as it never paid any to Gregan.

The judgment is affirmed.

NOTE.—In *The Kingston Bank v. Ellings* (40 N. Y., 391), published after the above had been prepared for publication, the rule allowing a recovery of money, paid under mistake in facts, is held to apply when the party receiving the money cannot be restored to his former position after repayment, and although the plaintiff may be chargeable with negligence.—[Rep.]

The case arose out of the mutual negligence and misapprehension of the parties, who had equal facilities for ascertaining the actual facts; but the court say, per HUNT, Ch. J., "care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is, are the parties mutually in error, and did they act upon such mutual mistake, not whether they ought so to have acted. If in consequence of such mutual mistake one party has received the property of the other, he must refund, and this without reference to vigilance or negligence."

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JOHN MANLEY, Respondent, v. THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA, Appellants.

(GENERAL TERM, EIGHTH DISTRICT, MAY, 1869.)

A referee is now required, by Rule 32 of this court, to state the facts found by him in his report.

The General Term will assume that a referee has so stated all the facts found by him affirmatively, and that he negatives those facts litigated on the trial, upon which his report is silent;

And on appeal from a judgment entered on the report of a referee, will review the questions of fact upon the evidence, and affirm or reverse the referee's decisions thereon, whether express, or implied from the silence of his report.

The remedy, in this court, to secure the performance of his duty by a referee, is by motion. If important, for a proper review, that his findings of fact shall be more ample, the proper practice is a motion to recommit the report with directions to find how the fact was upon the evidence.

The suggestion in *Grant v. Morae* (22 N. Y., 328), that this court would perhaps grant a new trial for a referee's refusal, in settling the case, to find upon all the issues, disapproved.

The practice, in bringing questions for review, before the General Term, on appeals in this court stated. Per MARVIN, J.

The methods of providing for a review in this court, and in the Court of Appeals, when the appeal is from a judgment entered upon a referee's report, stated and distinguished. Id.

M. having possession of lands, under a contract for their purchase from C., effected an insurance on the buildings thereupon, and, after they were in part destroyed by fire, directed the insurer to pay the loss to C., and at the same time assigned to C. the policy; the insurer refused to approve of the assignment, because it included the insurance upon the buildings destroyed; the assignment then being amended, by consent of parties, to meet the insurer's objection, the latter, reciting that C. had purchased the property, indorsed an approval.—*Held*, there was no breach of a condition not to assign without the insurer's approval.

It may be inferred, under such circumstances, that the assignment was made to take effect on the insurer's approval.

An assignment so made does not violate a condition which requires that the consent of the insurer shall precede the assignment.

A transfer by the assured of a portion of the thing insured, does not avoid the policy as to his remaining interest.

The decisions in *Tillot v. The Kingston Mut. Ins. Co.* (1 Seld., 405) and

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Murdock v. The Chenango Co. Mut. Ins. Co. (2 Coms. 210), explained, and the difference in practice, in like cases, at the time of those decisions and under the Code, pointed out. Per MARVIN, J.

APPEAL from judgment upon the decision and report of a referee..

The defendant issued to the plaintiff a policy, August 31, 1866, whereby it insured the plaintiff against loss or damage by fire to the amount of \$5,000 ; \$3,500 on his frame house, and \$1,500 on his three barns, being \$500 on each barn, for the period of three years.

November 4, 1867, the house and one of the barns were destroyed by fire, and one of the barns damaged to the amount of \$100. This action was brought to recover these losses.

A further statement of the case, and the questions made, appears in the opinion.

Henderson & Wentworth, for plaintiff.

Wilkes Angel, for defendant.

Present—MARVIN, LAMONT and BARKER, JJ.

By the court—MARVIN, P. J. The referee found the issuing of the policy, and the loss while the policy was in full force ; that the house and barn destroyed were of the value of \$4,000, and upward ; that the damage to another barn was \$100 ; that the plaintiff gave due notice to the defendant of the fire, with proof of the loss and damage occasioned thereby, and as a matter of law he decided that the plaintiff was entitled to recover \$4,100, and interest \$263.10.

The defendant filed several exceptions, some of which will be noticed hereafter.

At the close of the evidence the defendant's counsel requested the referee to find and decide, as matter of law, certain propositions ; and the referee refusing so to find and decide, the counsel excepted. Some of these will be hereafter noticed.

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The counsel for the plaintiff has constructed his brief and made his argument upon the theory that no questions of fact are presented for review except those found by the referee; and that no question of law can be raised except upon the facts found, and upon the admission and rejection of evidence during the trial, and on the motion for a nonsuit. This position of the counsel is erroneous. He cites *Grant v. Moree* (22 N. Y. R., 323), *Phelps v. McDonald* (26 N. Y. R., 82). These cases relate to the jurisdiction of, and practice in the Court of Appeals, where questions of *law only* are reviewed.

The jurisdiction of this court is more extended. "An appeal upon the law may be taken to the General Term from a judgment entered upon the report of referees or the direction of a single judge of the same court, in all cases, and upon the *fact when the trial is by the court or referees.*" (Code, § 348; see also §§ 267, 268, relating to trial by the court.) Upon an appeal from the judgment, when the trial has been by the court, the questions of *law or fact*, or *both*, may be reviewed by the General Term.

The review is in the same manner, embracing questions of law and fact, when the appeal to the General Term is from a judgment entered upon the trial by referees. (Code, § 272.) If a party desires a review upon the evidence appearing on the trial, either of the questions of fact or of law, he may make a case or exceptions in like manner as upon a trial by jury. (§ 268.) When the trial is by jury, exceptions may be taken and stated in a case or separately, with so much of the evidence as may be material to the questions to be raised.

If the evidence necessary to show the pertinency of the exceptions only is stated, the case or exceptions is a simple substitute for the old bill of exceptions. But the case may contain all the evidence and the exceptions, and upon a motion in such case, at Special Term, for a new trial, the exceptions and the evidence are before the court for review, and a new trial may be granted upon the exceptions or upon the ground that the verdict is against evidence, and an appeal

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lies to the General Term from the decision of the Special Term. (Code, §§ 264, 349.) If the party does not complain of the verdict, the case should only contain the exceptions with so much of the evidence as may be material to raise the questions presented by the exceptions. (Code, § 264, Rule 36.)

Upon an appeal to the General Term, *from the judgment*, questions of law, raised by the exceptions only, are examined, as we have seen by a reference to § 348. The facts are only reviewable by the General Term in appeals *from judgments*, "when the trial is by the court or referees."

Referees are required to "state the facts found and the conclusions of law separately." (Code, § 272.)

In *Johnson v. Whitlock* (3 Kern., 344), Judge COMSTOCK considered this provision of the Code, and came to the conclusion that the referee was not required, in his report, to state the facts found by him, but that the findings of fact might be omitted until a case should be made. Although it would not, I think, be difficult to show, from an examination of the Code, keeping in mind the history of the amendments made from time to time to §§ 267, 268 and 272, that the learned judge fell into error, and that, in truth, it was never intended to relieve the referee from the duty of stating in his report the facts found by him, it is quite unnecessary to make the examination, as the Supreme Court, soon after the decision in the Court of Appeals, enacted a rule that, "upon a trial by referees they shall, in their decision and final report, state the facts found by them and their conclusions of law separately; a copy of which shall be served with notice of the judgment." (See Rule 32, of 1858.) The language of this rule is clear. The referee is required in his report to state the facts found by him. In the present case, the report of the referee states some facts found by him, but omits to notice certain other questions litigated on the trial, and the defendant complains of such omission. It would have been more satisfactory if the referee had found directly upon the question whether the risk had been increased by a change

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in the mode of occupying the house ; also, whether the assured had sold or transferred the property insured ; or had assigned the policy, &c. These questions were litigated upon the trial, and are made and presented here, and, as I have already said, they are before us for review, and we have no difficulty in considering them, and making a proper disposition of the case by affirming or reversing the judgment. As the language of the Code is that the referee " must state the facts found," and the rule is to the same effect, the court, in reviewing the evidence and the report, assumes that the referee has stated all the material facts which he found, affirmatively, and as to other questions upon which evidence was given, he was unable to find the facts as claimed by the unsuccessful party ; in other words, he negatived them. He is required to state only the facts he finds, and if he says nothing upon a question litigated on the trial, the implication fairly is, that he did not believe the fact to be as the party trying to establish it claimed it to be ; and such omission to notice the question in the report, is equivalent to a finding against the party. As the case contains the testimony, the question is presented to this court and examined precisely as though the referee had expressly found the fact against the party complaining. The question will then be, is such finding (express or implied, as the case may be,) against evidence. In this way the rights of the appellant are preserved, and it will hardly be necessary to send the case back to the referee. Cases, however, do occur where it is important, for an intelligent and proper review, that the findings of fact upon the issues or questions litigated, should be more ample than they are in the report ; and in such cases the proper practice is a motion that the report be recommitted to the referee with directions that he find how the fact upon the evidence was. Such motions have been occasionally made and granted, though it is rarely necessary for the protection of the rights of the parties upon an appeal to this court.

In this case some requests were made by the counsel for defendant that the referee should *find* and *decide*, as matter

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of law, certain propositions. The referee refused, and he excepted.

The counsel was unfortunate in the form of these requests. He probably intended to request the referee to find the fact or facts indicated, and then, upon such fact or facts, that the referee should decide the law as requested. It is, undoubtedly, very proper, in many cases, that counsel should call the attention of the referee to the evidence, and request him to find a particular fact. If, however, the referee refuses, this is not a matter for exception. It is proper, sometimes, the facts being proven, to request the referee to decide in the manner indicated. In this way the attention of the referee is directed to the particular proposition of the counsel. It is, however, rarely necessary, so far as a review in this court is concerned; as by the Code and rule, the referee is to report the facts found by him, and the conclusions of law separately. It will be well, before dismissing these questions of practice, to refer to *Grant v. Morse* (22 N. Y. R., 323), (and there are some other cases) where, in the opinion, some remarks are made as to the proper practice. As I have already stated, the Court of Appeals examines questions of law only. For the purposes of a review in that court, the question of law must be distinctly raised; and if it arises from the evidence, the fact which the evidence proves, or tends to prove, must be distinctly found. "The party appealing must make his case, and have it settled, with such a statement of facts as will show necessarily that the law is in his favor. If he does not, every intendment, not absolutely unreasonable in itself, will be against him." The learned judge, after remarking upon the practice in settling the case, says: "It was their (appellant's) privilege in procuring the referee to settle it, to require him to find upon all the issues, one way or the other. If he refused so to do, no doubt the Supreme Court would have granted a new trial for that very reason; or if not, then an exception to such a refusal might perhaps have been available in this court." These remarks were not necessary to the decision of the case,

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and I have quoted them for the purpose of saying that I think the suggestion that the Supreme Court would grant a new trial in case the referee should refuse, in settling the case, to find upon all the issues one way or the other, must have been made without such consideration as that learned judge usually bestowed upon cases examined by him. The remedy, in the Supreme Court, when the referee refuses to perform his duty, is by motion to the court for an order requiring him to act and to perform his duty. The case must be put in a proper condition for review in this court. If a party complains that the case has not been settled properly, in accordance with the practice, the remedy is a motion that it be resettled. It will be seen by consulting the cases in the Court of Appeals, *supra*, that a mode of preparing and settling cases tried by a referee was indicated, dispensing with the finding of facts by the referee in his report, and the preparation of those facts by the party making the case, subject to proposed amendments, and to a settlement by the referee. It has not been my intention, in anything I have said, to unsettle or disturb the general system thus indicated; but I have called attention to the rule adopted by the Supreme Court requiring the referee to state the facts found by him in his report. The great point with the Court of Appeals was, that the case settled by the referee should *contain* the findings of fact. The practice was here made to conform to the suggestions or requirements of the Court of Appeals, so that now the party appealing prepares a case, and in that case he inserts the findings of fact by the referee, and if satisfied with such findings, or if the findings of fact cover all the issues and questions litigated, then he does not propose the finding of any additional facts. If he thinks the issues are not all passed upon, he may, as I understand, propose the finding of additional facts; and so also as to the other party in proposing amendments. In this way the case will be in a condition to be reviewed in the Court of Appeals. In the Supreme Court, however, as the testimony is before the court, and the court reviews as well the questions of fact

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as of law, and applies the implication that as to all the questions upon which evidence was given, and as to which there is no express finding, the referee found against the appellant, or rather that he refused to find that the fact, as claimed, was established by the evidence, there is no difficulty in reviewing the case, though the referee has not found expressly upon some of the questions litigated.

Proceeding to the case now before us, I am satisfied that it can be reviewed in this court upon this appeal, and disposed of in accordance with the rules of law and the rights of the parties.

By one of the conditions of the policy, it was to become void if the risk should be increased by any means whatever. The defendant claimed that the risk was increased, and gave evidence upon that question. Whether the risk was increased was a question of fact; and as it does not appear from the report that the referee has expressly found upon this question, the implication is that he could not include it as one of the facts found by him; that he negatived this claim; and the question for this court is, was the evidence such as to require the referee to find that the risk was increased? The insurance was against loss or damage by fire on his (Manley's) frame house and his three barns, situate on the farm known as the Howe farm, Little Valley, N. Y. Nothing is said in the policy or conditions touching the occupancy of the buildings. It appeared from the evidence that at the time the insurance was effected the dwelling-house was occupied by Mrs. Howe and two children; by Rev. Mr. Scott, wife, and two children; Alonzo Ames, wife, and child; Rev. Mr. Willoughby; Mrs. Fay and daughter, and some others. That such families occupied separate apartments of the house. This was in August, 1866. Mr. Vashing, a witness for defendant, testified that he lived in the house when it was burned, and had from April previous; and that Welch moved in when he did, and that they kept boarders; did not keep it as a general boarding house; only boarded men at work for Welch; they had some boarders the night of the fire; upon an average

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had ten boarders. Welch was building the court house, and the boarders were at work for him; no fires were kept in the house for boarders; none in their rooms. I do not think that a finding that the risk had not been increased by the boarding of the mechanics at work upon the court house could be properly set aside.

It is declared by one of the conditions of the policy that if the assured shall assign the policy, either before or after a loss, without the consent of the company indorsed thereon, or shall sell or transfer the property insured, the policy shall be null and void. The defendant claims a breach of both of these conditions. The referee is silent upon these questions, except that he says: "*While the said policy was in full force*" the house, &c., were destroyed. The referee ought in fairness to have met these questions, and stated the facts, which he understood the evidence to prove.

The case shows that the interest of Manley in the property was that of a purchaser of the farm upon which the buildings were. He made the purchase of Chamberlain at \$13,000; the contract bears date July 11th, 1866. Manley had made some payments and had possession. The fire was November 4th, 1867. The case contained a paper signed by Manley, and dated November 23d, directed to the defendant, in which Manley authorizes and requests that in the adjustment of his policy for loss, etc., the proceeds thereof be paid to Chamberlain. At the same time there was an indorsement on the back of the policy by which Manley transferred, assigned, and set over to Chamberlain all his right, title, and interest in the policy of insurance, and all benefit and advantage to be derived therefrom, on the two barns unburnt. The words "on the two barns unburnt" were not in the instrument when Manley executed it. The history is, the assignment was presented to the agent of the defendant for approval, and the agent refused to approve a general assignment, so far as the buildings burned were concerned, and the words restricting the assignment to the unburnt barns were then inserted, and the agent then reciting that Chamberlain had pur-

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chased the property, indorsed an approval of the assignment, dated December 14th. It may fairly be inferred that at the time the policy was assigned to Chamberlain, he and Manley contemplated obtaining the consent of the company to it, and application was made to the agent for such consent. It may be that the language of the condition requires that the consent of the company should precede the assignment. If, however, an assignment is made, not to be effective until the consent or approbation of the company is obtained, it will not be a breach of the condition. I think also that it is a perfect answer to this objection that the instrument was reformed with the assent of all the parties, and, as put in evidence upon the trial, the assignment was limited to the barns unburnt.

As to the alleged sale or transfer of the property insured, the evidence shows that Manley, by an instrument in writing, dated February 23d, 1867, sold and conveyed to Porter Welch one undivided half of his interest in the contract for the Howe farm. I regard this as a sale of the one undivided half of the property insured. No consent of the company was obtained. What effect had this sale and transfer upon the rights of the plaintiff? Did the plaintiff lose all right to recover anything? I think he did not. He can recover to the extent of his loss, assuming that he remained the owner of the undivided half of the property insured.

It is never necessary to insert in a policy of insurance the condition that it shall become void in case of a sale or transfer of the insured property without the consent of the company. Such is the legal effect in the absence of any condition. The contract of insurance is personal and is for indemnity, and if the assured has transferred the subject of the insurance before loss, he has no longer any interest in the property. A party obtaining insurance must have an insurable interest or the policy will be void from the beginning, and as the contract is one of indemnity, he must have an interest in the thing destroyed at the time it was destroyed, otherwise he has sustained no loss. These are elementary principles in the law of insurance.

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In this case the question is not made that Manley had no insurable interest. He held the property under a contract by which Chamberlain agreed to sell and he agreed to purchase, and this gave him an insurable interest. See *Etna Fire Ins. Co. v. Tyler* (16 Wend., 385). Chancellor WALWORTH, in this case, says: "If the assured sells the property and parts with all his interest therein before the loss happens, there is an end of the policy, unless it was assigned to the purchaser with the assent of the company; or if he retains but a partial interest in the property, it will only protect such insurable interest as he had in the property at the time of the loss." (Page 397.)

The counsel for the defendant cited in his brief *Tillou v. The Kingston Mut. Ins. Co.* (1 Seld., 405). The policy was issued to the three plaintiffs, who were partners; they assigned it to one Ketchum as security, with the consent of the company, and, after this, one of the partners sold and transferred his interest in the insured property to his copartners.

In the Court of Appeals, Foot, J., said: "The case of *Murdock v. The Chenango Co. Mut. In. Co.* (2 Coms., 210), is decisive against the claim of the respondents to recover in this action for their own benefit." The opinion then proceeds to show that a recovery was proper for the benefit of the assignee, Ketchum, to the amount of his interest.

The case referred to in Comstock was this: Two tenants in common were insured, and one of them, before the loss, conveyed his interest in the premises to the other, and it was held that they could not maintain a joint action upon the policy. The reason for this decision will readily occur to all well informed as to the rules touching the parties to actions at law. As one of the plaintiffs had divested himself of any interest, he had no cause of complaint; as to him the policy was void. As the contract was with the two jointly, and as it was a rule that all joint contractors, if living, must be joined in the action, the action could not be maintained in case one of the joint contractors, obligees or promisees had released the cause of action. The action was gone as to all

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of them. These rules were not so dangerous and destructive to men's rights as we should naturally suppose, as there were other rules which rendered the cases rare in which the rule extinguishing the action would apply. Choses in action were not assignable, so as to permit the assignee to sue in his own name. If the cause of action was assigned, the action could be maintained in the name of the parties to the contract for the benefit of the assignee. But if one of two, or more, to whom a contract was made jointly, released the cause of action, before it had been assigned, it was gone as to all. By the insurance law, when the assured sold the thing insured, the contract as to him was void; there was no longer any contract with him, and he could not be a party to the action. In the case in *Selden, supra*, he was permitted to be a party because he sold and transferred his interest after the assignment, and the law would not permit the assignee to be prejudiced thereby. It will at once be seen that these cases, and the principles upon which they were decided, have no application to the case we are considering. The contract in this case was with Manley alone. He transferred a portion of his interest in the property, and as to that portion he ceased to have any right.

Before taking leave of Murdoch's case, I think I may be pardoned for suggesting that probably no such decision would now be made, after considering the really valuable reforms made by the Code touching parties to actions, and the rendition of judgments. The case was decided in the Court of Appeals, in 1849, under the old system, and without any reference to the Code. Now, by the Code, it is no objection to a recovery that too many persons have been made plaintiffs. If one of the plaintiffs proves a good cause of action, he is entitled to judgment; and as a sale by one of two or more persons jointly insured renders the policy *void* as to him, because he has ceased to have any interest in the property; it should be held that the contract remained good as a contract solely with those who remained owners at the time of the loss. It was not indeed decided in Murdoch's case

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that the action could not have been maintained by the plaintiff, who had not transferred his interest, and that he could not recover to the extent of his share of the loss. (See *Hoffman & Place v. Aetna Fire Ins. Co.*, 32 N. Y. R., 405, and cases cited.) In the present case Manley was entitled to recover the amount of his loss, not exceeding the amount of the risk taken. The risk taken upon the house was \$3,500, and upon each of the barns \$500. The evidence showed that the house was worth from \$8,000 to \$10,000, and the barn destroyed \$1,500. Half of each of these sums exceeds the amount of the risk taken, and the amount recovered. There is in this regard no error in the judgment.

It is not necessary, in the view I have taken, to consider the question of waiver by the company of any objection to the sale by Manley of half of his interest in the contract to Welch. The counsel made an oral point on the argument that the preliminary proofs do not show who were the respective owners at the time of the loss, as required by the policy. It appears from the case that it was admitted on the trial that the proofs required by the policy were made and delivered to the agent; besides, I think they were sufficient.

The judgment should be affirmed.

STEPHEN McNALL, Appellant, v. DAVID McCLURE, Respondent.

(GENERAL TERM, EIGHTH DISTRICT, MAY, 1869.)

On the trial of an action before a justice of the peace, for trespass by defendant's cattle, triers were appointed, and a juror was, on their decision, excused for favor; the defendant then asked that all the jurors summoned might be tried by triers. The justice examined them separately, under oath, and they testified that they believed the law in relation to cattle running on the highway to be a good law. No other objection to their competency appearing,—*Held*, the justice properly refused to submit the testimony of the jurors to triers.

The case of *Smith v. Floyd* (18 Barb., 522) distinguished.

Proceedings in Justices' Courts are to be liberally reviewed, and the judgments therein will be sustained unless manifestly erroneous.

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APPEAL from judgment of Cattaraugus County Court, reversing the judgment of the Justice's Court. The action was for trespass by defendant's cattle upon the plaintiff's premises. Issue was joined, by answer denying complaint and averring the vote of the town that cattle may run in the highway, etc., and on the day of trial a venire was issued at the instance of the defendant. The name of one Graves was the first drawn as a juror, and the defendant asked him if he had heard the suit talked about, and he said he had somewhat, though not much ; that he had expressed an opinion that defendant's cattle ought not to run in the highway. Thereupon two jurors, to whom no objection was made, were sworn as triers to decide as to the competency of Graves. They heard the evidence and decided that he was not competent, and he was told by the court that he was excused. The defendant then asked to have all the jurymen tried by triers. The court swore each and every one of them separately ; asked if they had heard the matter talked of. They all said they knew nothing about the suit, but believed the law in relation to cattle running at large in the highway to be a good one. The defendant insisted that inasmuch as they believed the law to be a good one, they were incompetent jurymen. The court held that the question of the validity or justice of the law was not a matter for the triers to decide upon, and that that being the only question raised by the defendant, they were competent, and the triers were accordingly discharged, the defendant objecting thereto. A jury was impaneled and sworn, and the cause was tried, and there was a verdict for the plaintiff, etc., etc.

S. S. Spring, for plaintiff.

David McClure, for defendant.

Present—MARVIN, LAMONT, and BARKER, JJ.

By the court—MARVIN, P. J. I think the County Court ought not to have reversed the judgment. What is the ques-

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tion presented? The defendant asked to have all the jury-men drawn tried by triers. The justice understood this as a challenge to the favor, and I shall so regard it. Two of the jurors summoned had been appointed triers, and had passed upon one case of challenge to the favor. When the defendant made the request that all the jurors drawn be tried by triers, the justice swore each and every one of them, and asked them separately if they had heard the matter talked of. They all said they knew nothing about the suit, but believed the law in relation to cattle running at large in the highway a good one. The defendant held (i. e. claimed) that inasmuch as they believed the law to be a good one they were incompetent jurymen. It does not appear whether the defendant claimed this as matter of law for the justice so to instruct the triers, or that it raised a question of fact for the jury upon the issue of bias. It certainly will bear the former construction. The court held that the question of the validity or justice of the law was not a matter for the triers to decide upon, and in this the justice was undoubtedly correct. It does not appear from the return that the defendant requested the justice to submit the evidence to the triers, but as it appears that the "triers were discharged under the objection of the defendant," I will give the defendant the benefit of the assumption that he did request a submission to the triers. But what evidence did he desire to have submitted? Simply that the proposed jurors had, as witnesses, stated that they believed the law in relation to cattle running at large in the highway to be a good one. Was this proper evidence to be submitted to the triers upon the issue whether the juror so believing was indifferent between the parties? Such opinion had no tendency to prove or disprove the issue. The return shows that this was the only question raised by the defendant. The justice understood that there was no evidence for the triers, upon the issue they were sworn to pass upon, and he discharged them.

Suppose a challenge had been made in due form to one of the persons summoned as a juror and the court had appointed

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triers, and then the challenger had declined to produce any testimony, would it be error in the court to discharge the trier? Or, suppose the challenger had offered testimony which the court rejected, or, as in this case, some fact was stated which the court decided was not proper evidence upon the issue, there being no evidence upon the issue, would it be error to discharge the triers? Clearly not. There must be some evidence upon the issue. The counsel in this case have made up pretty full briefs and have stated the law touching challenges to the favor quite clearly, and have referred sufficiently to elementary law and some modern cases, and they do not differ essentially as to the law, but as to its application in this case.

It is agreed that the question for the triers is whether the party challenged is indifferent between the parties. Whether he is free from bias; and it is agreed that this issue admits of a very wide latitude of inquiry. Any fact having a tendency to prove bias may be proved, or from which the triers may infer bias. The court, however, is to decide touching the admission of proposed evidence, subject of course to a review at the instance of the party conceiving himself aggrieved. In this case, the course of the justice was equivalent to a rejection of the opinion of the juror as evidence, that a certain law was a good one.

The law is very well stated, and many of the cases referred to in Wait's Law and Pr., v. 2, p. 610, *et seq.* *Smith v. Floyd* (18 Barb. 522) is cited by the counsel of both parties in this case, probably from the supposed similarity of the case. The defendant had plead a custom for the inhabitants to depasture certain lands. The challenge was made upon the ground that the juror had formed an opinion as to the custom; but it did not appear whether as to the existence of the custom or as to its legal effect as a defense to the action. The juror stated, as a witness, that he had formed an opinion against the custom. The court was requested to charge the triers that the testimony showed that the juror challenged was not indifferent. Refusal and exception. This exception was

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overruled, and it was held that an opinion adverse to the custom upon which the defendant relied for his defense raised a question for the triers, whether he was indifferent. The distinction between the cases is very clear. In that case, if the proposed juror was of the opinion that the custom did not exist, or that it was invalid, such opinion may have greatly prejudiced the defendant in his defense. In this case the challenged persons simply express an opinion upon a valid law enacted by the legislature, viz., that it is a good law.

In the case we are considering the proceedings before the justice do not appear to have been very formal. Triers had been appointed in one case, and that had been disposed of; and the defendant, who tried his own cause, then asked to have the jurors drawn tried by triers, and the court then swore each and every one of them, and asked a question or questions calculated to elicit the fact whether they had formed an opinion upon the case. Upon this question their answers must have been entirely satisfactory to the defendant. But, as they expressed the opinion that a certain law was a good law, the defendant insisted that was a disqualification. The justice thought otherwise, and that it raised no question for the jury; and as this was the only question raised by the defendant, the justice discharged the triers and proceeded to empanel the jury. The whole proceeding was quite informal. We review the proceedings in Justices' Courts liberally, and the judgments rendered in these courts should not be reversed unless manifest error is made to appear. I think the County Court erred in reversing the judgment, and its judgment should be reversed and the judgment of the Justice's Court affirmed.

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ALFRED OLENDORF, Respondent, v. DAVID COOK and HENRY A. COOK, Appellants.

(GENERAL TERM, EIGHTH DISTRICT, MAY, 1869.)

Upon the trial of an action of ejectment, defendant moved, after a jury had been impaneled, to dismiss the complaint, as containing no description of any land. The motion was refused, and he excepted; later in the trial, and after an accurate description of the premises claimed had been given in evidence, the court allowed the plaintiff to amend by inserting such description in his complaint.—*Held*, that conceding the description to have been originally uncertain and defective (under 2 R. S., 804, § 8), the court was at liberty to proceed with the trial, and the allowance of the amendment was an exercise of judicial discretion not subject to review.

Though a lease for years is a chattel interest which goes to the personal representatives, ejectment lies to recover possession of the land demised. Where an issue is raised by the answer upon reforming the instrument under which ejectment is brought (no issues having been settled with direction to try by jury), it should either be tried by the court prior to the trial of the principal issue, or reserved from the jury on submission of the jury issues. Per MARVIN, J.

When in such case, therefore, a trial occurs upon all the issues made, it is not error if the judge refuse to submit the question of reformation to the jury under evidence upon that issue. *Id*.

Defendant excepted to the decision allowing a description of the premises to be inserted in the complaint, and the court, afterwards under his general objection, directed the jury to find for possession by plaintiff according to the amended complaint, to which defendant also excepted. Whether he might, under such objection, claim as error on appeal that the judgment gave a longer term of possession than the proof warranted.—*Quere*.

Judgment being for possession as above stated, and plaintiff's title having expired since the trial, the judgment was affirmed, and execution for possession restrained.

APPEAL from judgment, upon verdict, in an action of ejectment.

C. D. Murray, for plaintiff.

Sherman & Scott, for defendants.

Present—MARVIN, LAMONT, and BARKER, JJ.

By the Court—MARVIN, P. J. It is alleged in the complaint that the plaintiff, May 1, 1869, was seized as tenant

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of the defendants for the term of two years, of premises situate in the village of Forrestville, etc., viz., the store-room of the said defendants, which at and previous to said time had been occupied by said defendants as a billiard saloon, and situate in said village and adjoining the Morrison House in said Forrestville, together with the cellar under said store, being the cellar and first floor of the building of the defendants, adjoining the Morrison House in the village of Forrestville in said county, together with the right to use the back yard of the lot upon which said building stands, in common with the defendants.

The defendants' counsel, after the jury was impaneled, moved that the complaint be dismissed on the ground that it did not allege sufficient title and interest in the plaintiff to maintain the action, it being only a leasehold interest for two years; and 2d, that the complaint contains no description of any land. The motion was denied and the defendants excepted.

The court, in a subsequent part of the trial, allowed the plaintiff to amend the complaint by inserting the description of the premises as contained in a deed put in evidence, viz.: "All that tract or parcel of land situate in the village of Forrestville, county aforesaid, being a part of lot fifty-eight in the sixth township and tenth range of the Holland Land Company's survey, bounded and described as beginning at a point in the south line of Main street in said village of Forrestville, etc., etc." The description is quite long and definite. The counsel of the defendants objected to the allowance of this amendment, and excepted.

The point is now made that the court should have dismissed the complaint; that it contained no description of land whatever, and 2 R. S., 304, § 8, is cited; also, *Budd v. Bingham* (18 Barb., 494).

It may be conceded that the description of the premises in the complaint was uncertain and defective. It was taken substantially from the lease, put in evidence, executed by the defendants and Delong, the plaintiff's assignor.

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The description was much better than the description in *Budd v. Bingham*. There the description was "northwardly by lands of said plaintiff; eastwardly by lands of said plaintiff; southwardly by lands of said defendant; and westwardly by lands of the said plaintiff." The court says (p. 498) this description embraces nothing whatever, and the judge proceeds to show this, as he understood the case, and that there was nothing to be made more definite and certain. And yet it is said in the opinion that the court, in its discretion, might have proceeded with the trial, and, if the plaintiff had established a right to recover, have taken a verdict and permitted him to amend in conformity with the evidence. This was the course adopted in the present case. The permission of a party to amend, under such circumstances, is a matter of sound discretion in the court (Code, § 173), and the decision is not a matter for exception.

The counsel for the defendants renews in his brief the objection that the plaintiff could not recover upon the title stated in the complaint, "it being only leasehold interest for two years," and cites Adams on Ejectment (18); also, the Revised Statutes on ejectment and some other provisions, and the counsel comments upon them. He also cites *The Mayor of New York v. Mabie* (3 Ker., 151), and some other authorities. By the common law the action of ejectment could only be maintained for *corporeal* hereditaments, and this is what Adams as cited says, and this is so now by our law. In *The Mayor of New York v. Mabie*, the right to collect wharfage was demised and leased to Mabie by the city, and the question was whether a covenant could be implied against the city for quiet enjoyment as to the acts of the city; and this depended upon the question whether the lease was a conveyance of real estate, as the Revised Statutes had declared that no covenant should be implied in such conveyance. It was held by the court that the instrument was not a conveyance of real estate, and that a covenant might be implied. The case has no application to the present case.

The counsel seems to suppose that the action to recover

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possession of land is controlled by the nature or quality of the estate, and as a term for years is a chattel interest, personal estate, and goes to the administrator as a chattel interest, that the tenant or owner of the term cannot maintain ejectment. This is a mistake. Ejectment at common law lay to recover possession of the land held under a lease for years, whatever was the duration of the term. If one is entitled to the possession of real property he may maintain an action to recover the possession. Real property is defined in the Code (§ 462) as lands, tenements and hereditaments. The action will not lie for an incorporeal thing. It must be something corporeal. In the present case the action was to recover possession of land, a store.

The defendants' counsel requested the court to submit to the jury the question as to a reformation of the lease, and the question as to fraud in procuring it. The court refused, and the counsel excepted.

David Cook, one of the defendants, as a witness, stated the conversation between him, and Delong preceding the execution of the lease. He says that Delong stated that he thought he would put in groceries on one side of the store, and crockery or dry goods on the other; that he told Delong that he objected to billiard tables being on the ground floor; that they were going to remove their table into the room over the store, and that he told Delong that it would be necessary to put in columns to support the floor above when the tables were moved there; that Delong said he could get them turned in Dunkirk, and that he did so; that he told Delong he had better put in the columns, as he was a merchant, and knew where he wanted them, and he said he would; that he told Delong he would not rent the premises except for a store; that Record drew the lease, the parties went to his office; that he told Record that they had agreed to rent the premises to Delong for a grocery or dry goods store; that he did not notice at the time that the provision was not in the lease as drawn, he supposed it was; that he did not know as he told Record to draw the lease so as to restrict it to a store.

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Henry A. Cook, the other defendant, says they asked Delong, before the lease was drawn, what he wanted to use the premises for, and he said groceries on one side, and dry goods or crockery on the other; that he proposed to come there and go into business.

Delong was examined for the plaintiff, and stated that Cook asked him what he was going to put in, and he said he did not know; that he might want to put in groceries or drugs; that Cook said he would lease the store; and at another time Cook asked him what he was going to put in the store, and he said he did not know, he might put in groceries, dry goods and liquors. They went to Record's office, and Cook dictated the lease, and it was read by Record, and he thinks Cook read it; he, Delong, read it.

Record was a witness for plaintiff. He drew the lease. Cook made all the directions about the lease, except the provision about fire. Cook dictated and he drew it, and thought it was ended and then read it, and then added the fire clause as suggested by Delong, and then read it all over again, and it was then signed by them and they took it away. Henry A. Cook was not at the office; he signed the lease at the store without reading, as his father said it was right, and it was taken back to Record for safe keeping.

Uriah Chapman, for plaintiff, heard Delong and David Cook talking about the property and leasing it. Cook asked Delong what he was going to do with it, and Delong said he did not know; and Cook said he did not care if he only took the premises.

Manley Griswold's deposition was read. He stated, at considerable length, the conversation between David Cook and Delong, and the terms of the contract. Delong, in answer to a question, said he wanted to use it for a provision store and grocery and he did not know but some crockery, and Cook told him he could have it for \$250 a year, paid quarterly. This witness details the talk about fixing the store, shelves, columns, etc., etc., but nothing more about the use to which the store might be put. The court decided

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that the evidence was not sufficient to authorize an amendment or reform of the contract, and the defendants excepted, and subsequently refused to submit the question to the jury, and the defendants excepted. I shall not now stop to inquire as to the proper practice in such a case; that is, whether the question of a reform of the contract was a question for the court or for the jury. Such questions, prior to the Code, were never tried by a jury unless so directed upon feigned issues, awarded by the Court of Chancery. It is very difficult if not impossible, in such cases, to submit them to a jury, and preserve the spirit of the rules and law as administered in courts of equity. I apprehend that when such a question is raised by the answer, it should be disposed of prior to the trial of the principal issue, as to the title to the land or the right of possession, or the evidence may be taken upon the trial of the principal issue, and the court may decide the equitable defense, as in this case, or reserve the question and take the verdict upon the jury issues. The issue of fact, in an action for the recovery of real property, must be tried by a jury, unless such trial is waived or it be referred by the consent of parties. (Code, § 253.) The issue as to reforming the contract is an issue to be tried by the court. (See Code, §§ 253, 254.) The court may in certain cases order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or refer it as provided in §§ 270, 271. (See § 254.) Section 72 abolishes feigned issues and substitutes distinct and plain questions of fact, and rule 33 provides the practice. The court may, in all the cases embraced in § 254, try the issue. This section embraces what were known as suits in equity. Now, in this case, the issue as to reforming the contract was an issue by itself, and an issue to be tried by the court and not to be submitted to the jury. The court decided it, and it is not and cannot be claimed that the decision was against the evidence. There was no evidence to go to the jury.

But assuming that it was a question to be submitted to a jury upon sufficient evidence, as I think it was not, no issues

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having been settled and directions to try by jury, still I think no error was committed.

The preponderance of the evidence was so decided that, had the jury found as a fact that the parties agreed that the store should not be used for a billiard room or lager saloon, and that it was agreed that such provision should be inserted in the lease, and that this had been omitted by inadvertence, the court would, upon motion, have set the verdict aside. The evidence of David Cook, standing alone, would hardly have justified a decree reforming the lease. Delong, and several other witnesses, give a very different relation of the talk of the parties. The evidence of the scrivener is very clear. He drew and read the lease, as dictated by Cook.

The question of fraud may, perhaps, have been a proper question for the jury, as the plaintiff's right to possession depended upon the lease, and, if this had been fraudulently obtained, the defendants could avoid it.

The theory of the defendants was that the plaintiff Olendorf procured Delong to get the lease by artifice, so that he could use the store for his billiard tables. There was an utter failure of evidence to establish this position, and a verdict affirming it would have rested upon suspicion. Delong says he sold the lease to the plaintiff for twenty-five dollars; that he had no understanding with him; that he took the lease himself and intended to go there. Olendorf was a witness, and it appeared from his and Delong's evidence that they had had conversation about the store, and Delong had told him it could be rented and the price, and asked him what he thought of it, and Olendorf told him he thought it cheap, etc. Delong lived in Dunkirk, and Olendorf in Forrestville, where the store was. After Delong had obtained the lease, the plaintiff spoke to him about it, and said he would like to own the lease or a part of it, and Delong said he would think of it.

I repeat that any verdict that there was fraud in procuring the lease would have rested upon no evidence, but upon suspicion.

The court directed the jury to find a verdict for the plain-

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tiff for the premises, as claimed in the complaint as amended, and the defendants excepted. Upon this the point is now made that the amendment of the complaint related only to the description of the land, and that as the complaint alleged that the plaintiff was seized, on the 1st day of May, 1868, as tenant of the defendants for the term of two years, of the premises, the plaintiff has recovered for a longer term than the proof justified.

The demise is "for and during the term of one year from the 1st day of May, 1868, with the refusal thereof for the next succeeding year thereafter, at the same price hereinafter named." I do not understand that the plaintiff had by virtue of this lease, a title for a term beyond one year from May 1, 1868. The refusal for another year was a covenant for a lease for another year if the lessee should elect to take such lease, and if he should so elect perhaps no new lease would be necessary. The recovery should have been as upon a demise of one year only. But I doubt whether the exception was sufficient.

The court had just allowed the complaint to be amended by inserting a proper description of the premises, and then directed a verdict for the premises as claimed in the complaint as amended, and the defendant excepted. What did the court probably understand by this general exception? Probably nothing more or less than that the counsel objected to any recovery, or rather that the court should direct a verdict claiming that the plaintiff had no right to recover, or that the case should go to the jury. This followed by requests that certain questions should be submitted to the jury. The court would not be likely to understand that the exception was pointed to the question now made, viz.: That the verdict would be for a term of two years instead of one, commencing May 1, 1868. If the counsel so understood, at the time, he should have called the attention of the court to the lease in evidence, and to the fact that the complaint was too broad, and the complaint could have then been amended, or the direction to the jury modified.

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There needs, however, be no difficulty now in the case. The Code gives the court *here* ample authority to correct the mistake before or after judgment, in furtherance of justice, to conform the pleadings to the facts proved. (Code, § 173.) This is a very proper case for the exercise of this discretionary power, and the court directs such amendment. The verdict in this case was general for the premises as demanded in the complaint. By the statute, the verdict should have specified the duration of the term. (2 R. S., p. 307, § 30, subdivision 7.) If the term had been properly stated in the complaint, as required by 2 R. S., p. 304, § 10, the verdict would have been sufficiently definite to comply with the provision of the statute. It is provided by the statute, that if the right or title of the plaintiff expires after the commencement of the suit, and before trial, the verdict shall be returned according to the fact, etc., etc., and the judgment shall be as to the premises claimed, that the defendant go thereof without day. In this case the right and title of the plaintiff have expired since the trial. I suppose the court simply affirms the judgment, but no execution for the possession will issue or be awarded. The complaint should be amended as above stated, and the judgment should be affirmed with costs.

THE PEOPLE ex rel. HENRY C. SOUTHWICK v. WHEELER H.
BRISTOL, Treasurer of the State of New York.

(GENERAL TERM, THIRD DISTRICT, MAY, 1869.)

The auditor of the canal department is not authorized by law to direct in his warrant, drawn upon the treasurer, the particular bank having on deposit money belonging to the canal fund, upon which the check in payment of the warrant shall be drawn by the treasurer.

The treasurer of the State has the custody and control of the canal fund, subject only to such power over the same as is by law vested in the commissioners of the canal fund, and has, therefore, the right to determine from which depository the money shall be drawn to satisfy any such warrant. Per INGALLS, J.

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And it seems that the authority of the commissioners to direct the treasurer in this particular may be more satisfactorily inferred from the general powers conferred by law upon them, than such authority in the auditor can be inferred from the nature of his office, and the duties which by law devolve upon him. (Id.)

The commissioners of the canal fund having passed a resolution that the treasurer might, in his discretion, draw the check in payment of any warrant drawn by the auditor, upon any bank in the city of Albany having on deposit money applicable to the payment of the claim; and the auditor having drawn a warrant in favor of the relator, directing the treasurer to pay by check on the Mechanics' and Farmers' Bank, and the treasurer having drawn the check in payment of the warrant on the Merchants' National Bank, the auditor refused to countersign the same because it was not drawn on the bank specified in the warrant,—*Held*, on appeal from an order at Special Term, directing a mandamus to issue requiring the treasurer to draw the check as required by the warrant, that the treasurer, and not the auditor, had the right to select the bank on which the check should be drawn, and that the order appealed from should be reversed.

APPEAL from an order of the Special Term awarding a peremptory mandamus against the defendant, as treasurer of the State of New York, requiring him, forthwith, to draw his checks in favor of the relator in accordance with, and upon the banks designated in, the several warrants of James A. Bell, auditor of the canal department of the State of New York. Four several warrants, two of them dated in May, one in June, and the other in July, 1868, were issued by the said James A. Bell, auditor of the canal department, directing the treasurer to pay by check, drawn on the Mechanics' and Farmers' Bank of the city of Albany, to Henry C. Southwick, Jr., the sums of money in the said warrants specified, out of canal funds in the treasury, for the services of said Southwick. Upon the presentation of the warrants to the defendant, he drew and tendered checks, drawn upon the Merchants' National Bank of Albany, for the amounts required by the said warrants. The auditor refused to countersign such checks on the ground that they were not drawn upon the bank designated in said warrants, claiming the right to specify the bank from which the funds should be so drawn. The treasurer refused to comply with the requirement of the

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auditor in that particular, claiming that as such treasurer he had the right to designate the bank from which the money should be drawn to pay the sums required by said warrants. The checks, to be valid, required to be countersigned by the auditor, and that being refused, the relator could not procure compensation for his services, and he applied at Special Term and procured an order directing a mandamus to issue requiring the treasurer to draw his checks as required by said warrants. From such order this appeal was taken.

W. F. Allen and *M. B. Champlain*, attorney-general, for the appellant.

John H. Reynolds, for the respondent.

Present—MILLER, INGALLS, and PECKHAM, JJ.

By the Court — INGALLS, J. A conflict has arisen between the auditor of the canal department and the treasurer of the State, as to which is by law authorized to designate the bank from which money belonging to the canal fund shall be drawn to pay claims upon such fund. This is the only question involved in this appeal. I have examined with care the elaborate opinion delivered at Special Term, in connection with the various statutes which have been passed from time to time by the legislature touching this question, and, while I entertain the greatest respect for the opinion of the learned judge who decided this motion at Special Term, I am compelled to differ with him in the conclusion to which he arrived, and will state the reasons therefor. The treasurer is a constitutional officer of the State. Article 5, section 1 of the constitution provides for the election of that officer. Section 6 of the same article prescribes, in regard to the powers and duties of the treasurer, as follows: "The powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as now are or hereafter may be prescribed by law."

The Revised Statutes, volume 1, page 177 (Edmonds' edi-

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tion), provides as follows: "§ 1. The treasurer shall receive all moneys which shall from time to time be *paid into the treasury of the State*." The treasurer is required by statute to give a bond, with not less than four sufficient sureties, in the sum of \$50,000 for the faithful execution of the duties of the office. Statutes have been passed from time to time by the legislature, providing for the care and custody of the funds of the State, arising from various sources, and either in terms directing the money paid directly into the treasury of the State, or subjecting the same to the control of the treasurer. The following are some of these statutes: Laws 1826, chapter 314; Laws 1841, chapter 238; Laws 1842, chapter 114; Laws 1844, chapter 314; Laws 1861, chapter 177. The statute of 1817, chapter 262, which provided for the creation of the canal fund in section 6, provides as follows: "And further, that the said superintendent, instead of a yearly report to the legislature, shall make a quarter yearly report to the commissioners of the canal fund, and pay into the *treasury* of this State, on the first Tuesday of February, May, August and November, in each year, all the moneys collected by him during the quarter preceding each of those days, etc." Thus bringing such fund directly under the control of the treasurer of the State, which officer was by the same statute designated as one of the commissioners of the canal fund. The legislature has, in several instances, directed the deposit of certain funds of the State in banks, having reference as well to the convenience of depositors as the security of such funds. The Revised Statutes, volume 1, page 178 (Edmonds' edition): "§ 7. The treasurer shall deposit all moneys that shall come to his hands on account of this State (except such as shall belong to the canal fund), within three days after receiving the same, in such bank or banks in the city of Albany as in the opinion of the comptroller and treasurer shall be secure and pay the highest rate of interest to the State for such deposit." Also in regard to the money belonging to the canal fund. Statute 1817, chapter 262, before referred to: "§ 9. The said collectors shall deposit the moneys received by them for tolls to the

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credit of the treasurer of this State, at least once in two weeks, in such of the banks as may from time to time be *designated by the canal board, as near to the collectors as may be convenient.*" This provision of the statute was, in part at least, for the convenience of depositors; at the same time recognizing the authority of the treasurer as the officer entitled to the custody and control of such fund. Laws 1826, chapter 314, section 9, provides as follows: "The said collectors shall deposit the moneys received by them for tolls, to the *credit of the treasurer of the State*, at least once in two weeks, in such of the banks as may from time to time be designated by the canal board, as near to the collectors as may be convenient." In 1831 the legislature passed another statute in regard to the moneys belonging to the canal fund. Laws 1831, chapter 286: "§ 1. The commissioners of the canal fund may deposit the moneys belonging to said fund with any safe incorporated moneyed institutions in this State, and may make such contracts with such institutions, for the interest on and duration of such deposits, as shall be most promotive of the interest of said fund." While this statute conferred upon the commissioners of the canal fund the authority to contract for the deposit of the moneys belonging to that fund, it did not, in terms, at least, direct in what name such deposit should be made, nor by whom it should be drawn. In 1848 the statute was passed which created the office of auditor. Laws 1848, chapter 162, and the 1st and 2d sections of that act, define the power and duties of that officer as follows: "§ 1. There shall be an auditor of the canal department, who shall be appointed in the same manner and receive the same compensation as is now provided by law in relation to the chief clerk of the canal department, and the said office of chief clerk of the canal department is hereby abolished. § 2. All the powers and duties of the chief clerk of the canal department and all the powers and duties of the comptroller in relation to the canals (except his powers and duties as commissioner of the canal fund) are hereby transferred to and vested in

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the said auditor ; and the said auditor shall also be secretary of the commissioners of the canal fund, and of the canal board." Subsequent sections of said statute provide that the auditor shall have the care of the books and records, and be authorized to employ clerks, &c. By this statute there is conferred upon the auditor all the powers and duties of the chief clerk of the canal department, in relation to the canal fund, except his powers and duties as commissioner of the canal fund. The office of chief clerk was created by the statute of 1840 (see Laws, 1840, chapter 288). The 12th section of that statute provides : " The chief clerk shall also be clerk of the canal board, and shall receive the compensation, possess all the powers, and perform all the duties of the *second deputy comptroller*, as now provided by law ; and the said office of second deputy comptroller is hereby abolished." The office of second deputy comptroller was created by the statute 1833 (Laws 1833, chapter 56), and his duties are defined as follows : " § 2. The deputy to be appointed pursuant to this act may perform any of the duties of the comptroller in relation to the canals, except as a commissioner of the canal fund. § 3. Such deputy shall be the clerk of the commissioners of the canal fund, and of the canal board." We perceive the auditor is not created a commissioner of the canal fund, but is expressly excluded from discharging the duties of the comptroller as such commissioner. I do not understand that the auditor was clothed with any additional powers by the statute of 1857 (Laws 1857, chapter 783), which affects this question.

From an examination of the statutes in regard to the powers and duties of the comptroller, (other than those which he performs as commissioner of the canal fund), and the powers and duties which were conferred by statute upon the chief clerk of the canal department ; and upon the second deputy comptroller ; and of all the statutes to which my attention has been directed, I fail to discover any statute which authorizes the auditor to direct by his warrant the bank from which the moneys of the State, belong-

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ing to the canal fund, shall be drawn upon the check of the treasurer. Nor do I perceive anything in the nature of his office, or the duties incident thereto, from which such authority can be implied. It is obvious, from the provisions of the statute of 1848, which created the office of auditor, that the legislature did not intend thereby to place the canal fund beyond the control of the treasurer. Section 8 of that statute provides as follows: "§ 8. Dues of the State which have heretofore been paid to the commissioners of the canal fund shall, on and after the 1st day of October next, be *paid into the State treasury*. § 9. All balances standing to the credit of the commissioners of the canal fund on the 1st day of October next, in any depository, shall as of that date be transferred by the said commissioners to the *credit of the treasurer of the State*." There is no provision of that statute which directly in terms, or by fair implication, confers upon the auditor the authority which he claims to exercise. The 11th section of that statute contains the direction in regard to drawing money from the canal fund, and is as follows: "All moneys now authorized by law to be paid or advanced by the commissioners of the canal fund, and all moneys which shall hereafter be authorized to be paid or advanced from the canal fund, shall, on and after the 1st day of October next, be paid *by the treasurer*, on the warrant of the auditor; but no warrant shall be drawn unless authorized by law, and every warrant shall refer to the law under which it is drawn." There is nothing in said section which even intimates that the auditor should indicate in his warrant the bank from which the money shall be drawn. Considering the nature of the office of treasurer, and the duties imposed by law, and the various statutes to which we have referred, I am convinced that the treasurer has the custody and control of the fund in question, subject only to such power over the same as is by law vested in the commissioners of the canal fund (which will be considered hereafter), and that the treasurer has therefore the right to determine from what bank, having on deposit such fund, money shall be drawn to satisfy any amount

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required by the warrant of the auditor. It is unnecessary to determine which officer is superior in rank; all that we desire to ascertain is, which is authorized to perform the particular duty in question; and beyond that we do not desire to inquire or speculate, or to endeavor to settle any question of etiquette. The fact that the moneys of the State are applicable to a variety of objects, and constitute separate funds, does not, in my judgment, militate against the views above expressed, as that consideration only affects the manner in which the accounts are to be kept, the money deposited, and the purposes to which the same is applied. The defendant further insists that the right which he claims to exercise has the support of the action of the commissioners of the canal fund. Article 5, section 5, of the constitution of the State, provides: "The lieutenant-governor, secretary of State, comptroller, treasurer, and attorney-general shall be the commissioners of the canal fund." Section 6 of same article provides, in regard to the powers and duties of such board, as follows: "The powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as were, are, and hereafter may be prescribed by law." The Revised Statutes, volume 1, page 193, section 4 (Edmonds' edition), provides as follows: "The canal fund shall continue to be superintended and managed by the commissioners of the canal fund," etc. Section 5 provides: "It shall be the duty of the commissioners of the canal fund to manage, to the best advantage, all things belonging to that fund." The 10th section of the statute of 1858, above referred to, provides: "Whenever directed by the commissioners of the canal fund, the treasurer shall transfer from one depository to another, by a draft to be countersigned and entered by said auditor, any canal fund moneys standing to his credit; and no such moneys shall be transferred by the treasurer from one depository to another unless by such direction." We have already referred to several other statutes relating to the power conferred upon the commissioners of the canal fund to direct in regard to the depositing of moneys belonging to that fund; and we are

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inclined to the opinion that authority to direct the treasurer by the commissioners of the canal fund, as to which bank moneys shall be drawn from to satisfy claims against such fund, may be more satisfactorily implied from the general powers conferred by law upon such commissioners of the canal fund, than such authority in the auditor can be implied from the nature of the office of auditor and the duties which by law are devolved upon that officer.

It appears that at a meeting of the commissioners of the canal fund, held October 10th, 1862, the following resolution was adopted :

Resolved, That the form of the warrants upon the treasurer used by the auditor designating the canal deposit banks on which the treasurer shall draw his checks in payment of claims payable out of the canal fund, and which have been in use since the 1st day of October, 1848, be and the same is hereby approved by this board.

At a meeting of the commissioners of the canal fund, held April 16th, 1868, the following resolution was adopted :

Resolved, That the resolution adopted October 10, 1862, authorizing the auditor to select the banks from which money shall be drawn in payment of dues from the canal fund, be and is hereby rescinded.

At a meeting of the commissioners of the canal fund, held April 28, 1868, the following resolutions were adopted :

“*Resolved*, That moneys payable into the treasury belonging to the canal fund shall be paid to the treasurer, who shall give a proper receipt therefor, which receipt shall be countersigned by the auditor of the canal department, who shall also keep the proper accounts of such moneys in books to be kept by him in the canal department.

The treasurer shall deposit all such moneys received by him in one of the banks in the city of Albany, designated by the commissioners of the canal fund for the deposit of moneys belonging to the canal fund, and procure an entry of said deposit to be made by the bank officers in a pass-book to be kept by him. Each of said banks of deposit shall also furnish

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a duplicate pass-book for the auditor, and cause all deposits of moneys belonging to the canal fund to be entered therein.

It shall be the duty of the said auditor on the first Tuesday of each month, or as soon thereafter as practicable, to examine the debts and credits in the bank books kept by the treasurer, and if he discovers any irregularity or deficiency therein he shall, unless the same be rectified or explained, report the same, in writing, to the commissioners of the canal fund.

The auditor of the canal department shall not designate in his warrants drawn upon the treasurer, or otherwise, the bank or banks upon which the treasurer shall draw his checks in payment of such warrants. But the treasurer in payment of any warrant drawn by the auditor shall be at liberty to draw his check upon any of the banks of the city of Albany having money on deposit to the credit of the treasurer belonging to the canal fund, and applicable to the payment of the claim, and the said auditor shall countersign the said checks so drawn, and enter the same as required by law.

The acts of the treasurer in drawing checks in payment of warrants drawn upon him by the auditor upon banks other than those specified in the warrants are ratified and approved, and the auditor is directed to countersign and enter the said checks as required by law."

Thus it appears that as early as 1862 the question must have arisen in regard to the authority of the auditor to designate by his warrant the bank from which moneys should be drawn to pay claims upon the canal fund; for it was then at least deemed prudent, if not actually necessary, to procure the direction of the commissioners of the canal fund in relation thereto, and from that period until April 16, 1868, the form of warrant used by the auditor was sanctioned by the said commissioners. By the subsequent action of the said commissioners of the canal fund, that sanction was withdrawn and the auditor expressly directed *not to designate* in his warrant the bank upon which the treasurer should be required to draw his check, but that the treasurer should be at liberty to draw his check upon any of the banks in the city of Albany

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having money on deposit to the credit of the treasurer, belonging to the canal fund. The treasurer, therefore, in the course which he has pursued in this particular, has acted not only upon the authority which he possesses as treasurer, but also in accordance with the express direction of the commissioners of the canal fund, as expressed in the resolutions adopted by that body. It is very clear to my mind, as a question of strict right, and in that respect this matter must be considered, the treasurer is authorized to direct from which bank holding such deposits money shall be drawn to pay the sums required by the warrant of the auditor. We do not feel at liberty to allow considerations of expediency or convenience to control in the disposition of this question. If the treasurer possesses the authority he should exercise it, because the law confers it upon him, and order and harmony generally follow a proper observance of the law. I am unable to perceive why any inconvenience should result from the exercise by the treasurer of this right which he seems to possess. I am, therefore, of opinion that the order of the Special Term should be reversed with costs.

Order reversed.*

HENRY R. MYGATT, Respondent, v. LUCINDA WILLCOX and
WHITMAN WILLCOX, Appellants.

(GENERAL TERM, SIXTH DISTRICT, MAY, 1869.)

So long as an attorney is engaged upon a general retainer in the same matter, he may allow a portion of his disbursements or charges to overrun the six years, without peril from the statute of limitations.

Plaintiff was retained by defendants, administrator and administratrix of an estate, and acted for them on a final accounting in 1852, and also on an appeal from the surrogate's decree, which was reversed, and the matter sent back for a rehearing; and the matters before the surrogate, and contested on the appeal, remained undisposed of until settled by agreement of the parties in 1866.—*Held*, that plaintiff's retainer being general and not terminated by any express act of either party, continued until the final settlement in 1866, and that the statute of limitations did not begin

* This decision was affirmed by the Court of Appeals, at the March Term, 1870.

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to run against any item of his account for services and disbursements until that time.

The case of *Adams v. The Fort Plain Bank* (36 N. Y., 255), distinguished. Plaintiff having acted for both defendants, and their management of the estate being the subject for consideration before the surrogate, they were "united in interest" (Code, § 119) and jointly liable for plaintiff's fees and disbursements.

The liability of an administrator for the fees of counsel employed by him on an accounting is personal.

An allowance made by a surrogate for costs and counsel fees on an accounting, is not conclusive in an action by the attorney to recover for his services and disbursements.

In such action there is no distinction, as regards interest, between charges for disbursements and for services; in neither case can interest be charged, by way of penalty for a default, until a demand has been made, or the account is liquidated between the parties, or the debt has become due by the termination of the employment.

ACTION by plaintiff for services and disbursements, rendered and paid at the request of the defendants, upon an accounting had before the surrogate of Chenango county, and upon appeal from the decree rendered by said surrogate. The defendants were administrator and administratrix of the estate. The employment of plaintiff was in 1852. In 1855, a decree was made in which \$601 $\frac{5}{8}$ were allowed defendants as their costs and disbursements upon such settlement. In 1858, such decree was reversed upon appeal to the Supreme Court, and the whole case was ordered to be reheard before the said surrogate. The case remained in this condition (no rehearing being had) until February 26, 1866, when the parties settled all the matters in difference between them. This action was commenced May 2, 1867; was referred, and on the report of the referee, judgment was entered in favor of the plaintiff, for \$2,531.56 damages and costs.

The defendants appealed to this court.

Isaac S. Newton and *D. L. Follet*, for appellants, cited *Adams v. Fort Plain Bank* (36 N. Y., 255, and 23 How., 45); *Van Rensselaer v. Jewett* (2 N. Y., 135); *Judson v. Gray* (1 Kern., 408); *Rensselaer Glass Factory v. Reid* (5 Cow., 642-3); *Lusk v. Hastings* (1 Hill, 659 and refs.); *Jackson v.*

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Bartlett (8 John. R., 367); *Kellogg v. Gilbert* (10 John. R., 220); *Walradt v. Maynard* (3 Barb., 586); *Shank v. Shoemaker* (18 N. Y., 489); *Fox v. Fox* (24 How., 409); *Sweet v. Bartlett* (4 Sand., 661); *Tindall v. Jones* (11 Abb., 259); *Cullen v. Miller* (9 N. Y., Leg. Obs., 62); *Davis v. Gorton* (16 N. Y., 255); *Palmer v. City of New York* (2 Sand., 318); *Hallock v. Losee* (1 Sand., 220); *Kimball v. Brown* (7 Wend., 322); *Edmondston v. Thomson* (15 Wend., 554); *Green v. Ames* (14 N. Y., 225); *Peck v. N. Y. & U. S. Mail Co.* (5 Bosw., 226); *M'Laren v. Charrier* (5 Paige, 530); *Pratt v. Allen* (19 How. Pr. R., 456); *Trust v. Repoor* (15 How. Pr. R., 570).

Henry R. Mygatt, respondent, in person, cited *Willcox v. Smith* (26 Barb., 326); *Willson v. Burr* (25 Wend., 386); *Noyes v. Blakeman* (2 Seld., 580); *Monell v. Marshall* (25 How., 425); *Hill v. Tucker* (1 Taunt., 9); 3 Parsons on Con., 5th ed., 93; *Harris v. Osbourn* (2 Crompt. and Mees., 629); *Martindale v. Falkner* (2 Com. Bench, 706); *Whitehead v. Lord*, *adr.* (11 Eng. Law and Eq., 587); *Hall v. Wood* (9 Gray, 60); *Morse v. Potter* (4 id., 292); 1 Wait's Law and Prac., 982-84, 550; *Eliot v. Laneton* (7 Allen, 274); *Van Horn v. Scott* (4 Casey Penn., 316); *Walker v. Goodrich* (16 Illinois, 341); *Case v. Hotchkiss* (1 Transc. Appeals, 285); *McMahon v. N. Y. & E. R. R.* (20 N. Y., 469); *Sipperly v. Stewart* (50 Barb., 69); *Graham v. Chrystal* (2 Keyes, 25); *Van Rensselaer v. Jewett* (2 N. Y., 140); *Rensselaer Glass Fact. v. Reid* (5 Cow., 588); *Gillett v. Van Rensselaer* (1 E. P. Smith, 399); *Trotter v. Grant* (2 Wend., 413, 415).

Present—BALCOM, BOARDMAN and PARKER, JJ.

By the Court—BOARDMAN, J. I have examined with care nearly all the cases cited by counsel. As a result of such examination, it is clear that if the contract between the plaintiff and defendants was entire, to attend the final settlement of the accounts of defendants before the surrogate,

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it was continuous and lasted until such accounts were disposed of by the surrogate or by the parties. Where an attorney is retained in an action, the law fixes the responsibility of the attorney to act until the business is finally disposed of, unless upon notice or by arrangement such responsibility sooner ceases. The referee, by his second finding, determines that such was the fact in this case. It is contended by the defendants that such finding is not warranted by the evidence. That the plaintiff was retained in the case, and acted before the surrogate and on appeal, must be conceded. It is equally true that such business as he was engaged in before said surrogate and on said appeal was undisposed of until 1866, when the same was finally settled by the action of the parties. Upon the conceded facts, I think the law would declare the plaintiff's retainer general in the matter, and continuing until the final settlement in 1866. Under such circumstances the statute of limitations would not begin to run until the settlement in 1866, and plaintiff's action is well brought. (3 Pars. on Cont., 93; *Whitehead v. Lord*, 11 Eng. Law and Eq., 587; *Hall v. Wood*, 9 Gray, 60; *Eliot v. Lawton*, 7 Allen, 274.)

The case of *Adams v. Fort Plain Bank* (36 N. Y., 255) is not in conflict. The items of plaintiff's account, in that case, consisted of several isolated and independent charges for services in no way connected with each other.

Here, however, all the services rendered by the plaintiff were in and about a single transaction, the final settlement of the accounts of the defendants as administratrix and administrator, the retainer general and the employment continuous until the settlement. Indeed, on page 260, DAVIES, Ch. J., recognizes the rule laid down that the services must be brought to an end before the attorney can bring an action. It is in the power of an attorney, at any time, to demand pay for services rendered, and, if there be no contract in the way, he can refuse to proceed until such payment is made. Upon a refusal or neglect to pay after such demand he can sue for and collect the same. But so long as he is engaged in the

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same employment, upon the same matter, he may allow any portion of his disbursements or services to overrun six years without peril from the statute. The statute of limitations does not, therefore, bar plaintiff's cause of action.

Are the defendants properly joined? They insist their interests are not joint. But they were jointly interested in the settlement of their accounts, the employment was for their joint benefit. Plaintiff acted for them both, and both recognized and allowed such action on his part. However diverse or even hostile their interests might be on distribution, they necessarily harmonized in their trust capacity. Each had an equal interest in and control over the trust property, and their management and disposition of such trust estate was the subject for consideration before the surrogate. This brings the case within section 119 of the Code, "united in interest." It would be impossible to apportion such costs between these defendants. (1 Pars. on Cont., 5th ed., 14, 19.)

It is settled by the case of *Willcox v. Smith* (26 Barb., 316) that the defendants are personally liable to the plaintiff, and that they cannot be made liable in their representative character. (See also *Bowman v. Tallman*, 2 Robert, 385; 1 Wait Law and Pr., 84.)

The item of \$601.55, adjusted by the surrogate in 1855, was not conclusive between attorney and client. It was simply an allowance of so much to the defendants upon their account in exoneration of their liabilities. When the decree making such allowance was reversed, even the slight vitality given by the surrogate's allowance was gone, and the items thereafter remained as if they had never been allowed.

The referee allowed interest to the plaintiff upon his disbursements for defendants from the date of such disbursements respectively to the date of his report (June 12, 1868). In this I think the referee erred. He should have restricted that interest as in the case of services, and allowed interest thereon only from the 26th day of February, 1866. As the defendants' obligation to repay these advancements is implied from the relations of the parties, interest by way of penalty,

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cannot be charged thereon until a demand has been made, or the amount has been liquidated between the parties, or the debt become due, by the termination of the contract of employment. Until the debtor is in some manner in default, for not paying the money in pursuance of his contract, he is not chargeable with interest. (*Van Rensselaer v. Jewett*, 2 N. Y. R., 135.) We have already held that this contract was not complete, and that the plaintiff's right of action for his services and payment was not perfect until February, 1866. How, then, can it be held that the defendants were guilty of a breach of contract whenever a payment was made by plaintiff in their behalf, so as to entitle such payment to draw interest. The plaintiff was not bound to make these advances for the defendants; but if he did so, they must be treated as a part of his account, payable, as and when the remainder becomes payable, and drawing no more interest than such remainder. Moneys advanced are no more sacred, under the circumstances of this case, than services. Whenever the account as a whole is payable, from that time, interest is chargeable. (*Adams v. Fort Plain Bank*, 261.)

The exceptions of defendants are sufficient to cover the error of the referee.

The amount of interest improperly allowed as aforesaid, upon disbursements, prior to February 26, 1866, is \$281.33. A new trial, costs to abide the event, should be granted, unless the plaintiff shall stipulate to remit that amount from the judgment in this action at its date, in which case such judgment to be affirmed without costs to either party on this appeal.

Clinton v. Eddy.

WILLIAM M. CLINTON, Appellant, v. JOHN EDDY, Respondent.

(GENERAL TERM, SIXTH DISTRICT, MAY, 1869.)

The complaint averred, that under a contract between the plaintiff and defendant, the latter had received a sum of money, two-thirds of which belonged to the plaintiff, and the balance to the defendant, and claimed the two-thirds; the answer pleaded the statute of limitations, denied the alleged receipt of the money, averred to the contrary, that plaintiff had received it under the contract, and demanded judgment for the one-third. *Held*, plaintiff could not, without pleading it in reply, avail himself of the statute of limitations in bar of defendant's claim to the one-third.

The defendant's averment of indebtedness by plaintiff, was a statement of new matter constituting a counter-claim.

The term counter-claim, as used by the Code, comprehends recoupment and set-off. Per BOARDMAN, J.

THE essential controversy grew out of a sum of \$115, belonging two-thirds to plaintiff and one-third to defendant, which the plaintiff claimed had been paid to defendant in 1854, and the defendant claimed the same money had been paid to the plaintiff. The plaintiff therefore set up, as a substantive cause of action, that defendant was indebted to him for two-thirds of said \$115, and interest. The defendant answered denying such indebtedness and the receipt of said moneys, and alleged that plaintiff received the same; and claimed for affirmative relief that plaintiff was indebted to him for the one-third of said \$115 so alleged to have been received by plaintiff. Defendant also set up the statute of limitations in bar of plaintiff's alleged claim for the two-thirds. The plaintiff served no reply. Upon the trial the referee found as a fact that plaintiff received said \$115, and was indebted to the defendant for the one-third thereof, with interest; that the statute of limitations would have barred defendant's recovery if it had been set up by reply, and that such statute was not available to plaintiff without being pleaded. To this plaintiff excepted, and appealed from the judgment entered for the defendant.

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L. I. Burditt, for the appellant.

E. Countryman, for the respondent.

Present—BALCOM, BOARDMAN and PARKER, JJ.

By the Court—BOARDMAN, J. The plaintiff claims that he is entitled to two-thirds of a sum of money received by defendant by virtue of a contract in relation thereto between the parties. The defendant denies the receipt of such money; alleges the plaintiff received it and by virtue of the same contract, and claims to recover his one-third thereof from plaintiff. This is clearly a counter-claim under the Code. It is new matter constituting a counter-claim existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, and connected with the subject of the action. Again, as the plaintiff's action arises on contract, the defendant's cause of action also arising on contract, and existing at the commencement of the action, is a counter-claim. (Code sections 149, 150.) By section 153, such answer must be replied to if it contain a counter-claim, or, by section 168, the same will be taken as true. The term counter claim, as used in the Code, is, in general, broad enough in its signification to include recoupment and set-off. (*Lemon v. Trull*, 13 How., 248, aff'd, in Court of Appeals, 16 How., 576, n.; *Pattison v. Richards*, 22 Barb., 143; *Vassear v. Livingston*, 13 N. Y., 248, affirm'g S. C., 4 Duer, 285, 10 How., 67, 14 id., 97, 13 id., 84, 37 id. 299; *Thompson v. Kessel*, 30 N. Y., 383; *Gleason v. Moen*, 2 Duer, 639; *Xenia Bank v. Lee*, 2 Bosw., 694; *Schubart v. Hartear*, 34 Barb., 447; *Leavenworth v. Packer*, 52 Barb., 132.) These cases leave no doubt that defendant's answer sets up a counter-claim, which was admitted, by the neglect to reply. Even by the narrow distinction of a set-off, it has been held that a reply was necessary. (9 Howard, 263, 356; 10 Howard, 148.)

The case of *Thompson v. Sickles* (46 Barb., 49) is not in

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point. The considerations suggested by that case arose under section 112 of the Code, and were due to the peculiar relations of the parties. The set-off was not a claim by the defendant against the plaintiff, but against the plaintiff's assignor. The defendant could not have maintained an action thereon against the plaintiff, and that constitutes an essential requisite of a counter-claim. The same principle is established in *Wolf v. H.* (13 How., 84) and in *Gleason v. Meno* (2 Duer, 639). The equities existing between the assignor and the defendant are preserved by the Code, and they are treated as equitable payments in a controversy between the assignee and defendant.

There is no doubt the referee was correct in holding, that the answer in this case contained new matter constituting a counter-claim, and that such counter-claim cannot be barred by the statute of limitations, unless the same be pleaded by a reply.

The judgment appealed from should be affirmed with costs.

DANIEL HOWARD and FERRIS P. HURD v. ARCHIBALD ROBBINS
and GEORGE E. BARTLETT.

(GENERAL TERM, SIXTH DISTRICT, JULY, 1869.)

Every encroachment upon a public highway is not a nuisance.

An encroachment, which does not prevent the use of the highway for its ordinary purposes, is not, as such, a nuisance.

Nor have the trustees of the village of Watkins, by the charter of that village (§ 4, tit. 4, ch. 125, Laws 1861), power to declare that a nuisance, which, by law, is not recognized as such.

Accordingly, where said trustees, proceeding in the manner directed by said charter, declared an encroachment on one of the village streets to be a nuisance, and the defendants, being thereupon deputed by them so to do, removed it; and in an action by the owner to recover damages for such removal, the evidence did not establish a nuisance in fact.—*Held*, defendants were not protected by the determination and direction of the trustees. It seems, where an encroachment on a highway constitutes a nuisance, it may be abated to that degree only which will enable the public to enjoy the right of way.

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THIS action was for damages caused by the defendants in tearing down and removing some six and a half feet of a building belonging to the plaintiffs, and which had encroached, to that extent, upon a street in the village of Watkins sixty-six feet in width.

The trustees of the village had declared the encroachment to be a nuisance,* and the defendants had been appointed a committee to remove it, which they did by virtue of such authority and because the encroachment was in their judgment a nuisance.

The jury were instructed to assess the plaintiffs' damages and find a verdict for the amount assessed. The defendants' exceptions were ordered heard at General Term, and this was a motion for a new trial upon such exceptions.

J. J. Van Allen, for the defendants.

R. H. Marriott, for the plaintiffs.

Present—BALOOM, BOARDMAN and PARKER, JJ.

By the Court—BOARDMAN, J. The positions taken by the defendants are: 1st, that such encroachment is *per se* a nuisance which any person may remove; 2d, that the action of the trustees of the village of Watkins, under their charter, declaring such encroachment a nuisance, was, under the cir-

* The provision of the village charter, under which the trustees acted, is as follows, viz.: "§ 4. The said trustees shall have power to determine upon view, or upon testimony of witnesses (who may be examined on oath before them, such oath to be administered by any one of said trustees), whether any building, * * * * * or any other structure, substance, or thing whatever, within said village, is a nuisance, upon two days notice to the owner or occupant of the same, and to abate the same by causing it to be removed, and shall have full power to enter upon the premises upon which the same is situated, and cause the same to be removed; and may also impose a penalty by any ordinance of said village, in respect to any such nuisance, and enforce the same; but all such determinations shall require a concurring vote of two-thirds of all the trustees of said village.

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cumstances, conclusive evidence of the fact, and justified its removal by defendants as the agents of said village.

Neither of these positions is tenable.

It is not pretended that this encroachment prevented the use of the street for its ordinary purposes. It was not, therefore, an obstruction constituting a nuisance. (*Peckham v. Henderson*, 27 Barb., 207, 211, 212; *Griffith v. McCullum*, 46 id., 561; *Harrower v. Ritson*, 37 id., 301.) Every encroachment upon a public highway is not a nuisance. The evidence in this case does not establish such an obstruction as to constitute a nuisance. Nor have the trustees, by virtue of their charter (Laws of 1861, chap. 125, title 4, sec. 4), authority to declare that a nuisance which is not so in fact or in law. If they possessed that power they might make a crime and designate the criminal where the laws recognized neither, for one who maintains a nuisance is liable to indictment. They must act at their peril and within the law. So long as they so act their decisions can be enforced. But they are not beyond the law, and the law cannot be subverted by any adjudication of theirs. (*Hoffman, mayor, etc., v. Schultz and others*, 31 How., 385.) Every person who assumes to judge of and remove an obstruction to a highway upon the ground that it is a nuisance, does so at his own risk. If he misjudges, he is liable for the damages; if he is right, the law will uphold him. The action of the village of Watkins in its corporate right and by its agents is subject to the same rule. No power is given it to create and declare that a nuisance which by law is not recognized as such. Even if this encroachment were a nuisance, it would justify only such a degree of abatement as would enable the public to enjoy the right of way. (37 Barb., 301.)

In doubtful cases other modes are provided for determination of mutual rights. Such modes should be pursued where each party may be fairly heard and the rights of each equally protected.

The motion for a new trial should be denied and judgment ordered for plaintiffs on the verdict with costs.

Mason v. Hand.

DAVID MASON, Appellant, v. THOMAS HAND, Respondent.

(GENERAL TERM, SIXTH DISTRICT, MAY, 1869.)

When an action is brought directly upon a contract, express or implied, to recover the moneys due thereby, the summons should be framed in accordance with sub. 1, of § 129 of the Code.

The People v. Bennett (6 Abb., 343) upon this point, approved and followed. When the action seeks to recover damages arising from a breach of contract, the summons should be in the form required by sub. 2 of said section. *Semble*.

The complaint claimed a larger amount than that demanded by the summons.—*Held*, the variance was immaterial.

APPEAL from an order of the Special Term setting aside a complaint for variance from the summons. The summons demanded judgment for seventy-five dollars in money, while the complaint contained two counts, both apparently for the same cause of action, to wit: Board, and other necessities, supplied by the plaintiff to the defendant's infant daughter; the first being founded on an alleged promise to pay therefor and the second upon a *quantum meruit*. The damages demanded by the complaint were \$110. The Special Term order sets aside the complaint unless, &c.

B. R. Johnson, for the appellant.

E. S. Sweet, for the respondent.

Present—BALCOM, BOARDMAN and PARKER, JJ.

By the Court—BOARDMAN, J. This court, in the case of *Hubbell v. Hubbell* (MSS., opinion Genl. Tr.) adopted the rule laid down by BIRDSEYE, J., in *The People v. Bennett* (6 Abb., Pr. R., 343, 349), as follows: "When the action is brought for the recovery of a sum of money payable by the contract on which the action is brought, whether the contract be written or verbal, express or implied, and even if it be no more than a legal duty or liability, whether imposed by statute or declared by the judgment of a court, if the sum

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sued for is certain in amount, or capable of being reduced to certainty by computation, then the summons must be in the form prescribed by sub. 1 of § 129." In 1 Tilling & Sh., Pr., 356, etc., the authorities are collected and considered, and the same conclusion arrived at.

The cases of *Tuttle v. Smith* (6 Abb., Pr. R., 329, 14 How., 395), *Kidder v. Whitlock* (12 How., 208), *Cobb v. Dunkin* (19 id., 164), *Norton v. Carey* (14 Abb., 364, 23 How., 469), *Garrison v. Carr* (34 How., 187), cited by defendant, are none of them exceptions to the rule above laid down. Each of the above actions was brought, in part at least, to recover damages for a *breach* of contract. The gravamen of the complaint is the breach of the contract and the damages. The contract is only necessary as inducement. The cases cited by defendant hold that actions for damages arising from a breach of contract come under the 2d sub. of § 129, in which opinion this court entirely concur. But when the action is directly upon the contract, express or implied, to recover the moneys due thereby, the summons should be framed in accordance with the 1st sub. of § 129.

If the summons be so framed, and demands money only, it matters not what the complaint may claim by way of damages in case of default, since judgment can be taken for no greater sum than is claimed in the summons. (Code, § 246, sub. 1.) The variance between the amounts claimed in the summons and in the complaint is, therefore, immaterial, and cannot prejudice the defendant.

The order appealed from should be reversed, with ten dollars costs, and the defendant's motion denied, with ten dollars costs.

Cummings v. The New York and Oswego Midland Railroad Co.

STEPHEN M. CUMMINGS, Appellant, v. THE NEW YORK AND
OSWEGO MIDLAND RAILROAD COMPANY, Respondent.

(GENERAL TERM, SIXTH DISTRICT, MAY, 1869.)

To charge a railroad corporation with liability for the indebtedness of a contractor to his laborers, under § 12 of the general railroad act (Laws 1850, chap. 140), the indebtedness must arise from services personally performed by the laborers.

Accordingly, where an action was brought against a railroad company, in the manner provided by that section, to recover for the services of plaintiff's servant and team, rendered upon the defendant's road, for a contractor constructing a portion thereof, the claim was disallowed.

APPEAL from an order of the Chenango County Court denying plaintiff's motion for a new trial.

Plaintiff sued for his personal labor, and also for the services of his servant and team, while engaged upon the construction of a portion of the defendants' road, under the employment of a sub-contractor for such construction, and had recovered judgment on both claims before a justice of the peace. There was a retrial upon appeal, when plaintiff proved his personal services, and offered to show those rendered for the sub-contractor by his servant and team, in the construction of the road. The offer was rejected, and plaintiff excepted.

It appeared also that the action was brought, after the notice required by § 12, chap. 140, Laws 1850, and within the time limited thereby. The court ruled that plaintiff could recover only for his personal services, and directed a verdict for the value thereof, with interest. To the ruling and direction plaintiff excepted, and moved, upon a case containing the exceptions, for a new trial, which was denied, and appealed from the order denying his motion.

Calvin L. Tefft, for the appellant.

David L. Follett, for the respondent.

Present—BALCOM, BOARDMAN and PARKER, JJ.

By the Court—BALCOM, P. J. The defendants are a railroad

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corporation, organized in 1866, under and pursuant to chapter 140 of the Laws of 1850. (Laws of 1850, p. 211.)

The plaintiff's claim for his own labor, and that of his team and servant, performed for a sub-contractor of the defendants, in the construction of their railroad, was made against the defendants under and by virtue of § 12 of the act under which the defendants were organized as a corporation. The important portion of that section, so far as this case is concerned, reads as follows, viz.;

“As often as any contractor for the construction of any part of a railroad which is in progress of construction, shall be indebted to any laborer, for thirty or any less number of day's labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided; and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor.” (Laws of 1850, p. 215).

The plaintiff gave the proper notice, and commenced his action before the justice, within the time prescribed by such act to entitle him to recover.

No objection was made in the County Court to a recovery on the ground that the labor was performed for a sub-contractor in the construction of the defendants' railroad. No such objection could have prevailed, as against any portion of the plaintiff's claim; for it was settled by the Court of Appeals, in *Kent v. The N. Y. Central R. R. Co.* (2 Kern., 628), that the above mentioned § 12 extends to workmen hired by parties to whom the original contractor has sublet a portion of the work.

The only material question in the case is whether the plaintiff was entitled to recover for labor performed on the defendants' railroad, by his team and servant, for a sub-contractor, who was constructing a portion of such road. And this is not an open question in this court; it was decided adversely to the plaintiff's claim by the Court of Appeals, at the March term, 1856, in the case of *Atcherson v. The Troy*

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and Boston Railroad Company. That case has never been reported, but we have been furnished by Mr. Kernan, the then reporter of the Court of Appeals, with a copy of the opinions of the judges delivered in that case.

Judge JOHNSON said, in that case, when speaking of the act under which the plaintiff's claim is made, that "the design of the act was, it seems to me, to give the laborer a claim upon the company, for the amount due him from his employers for thirty days labor, *performed by himself*, or any number of days less than thirty. Nothing beyond this can fairly be inferred from the terms employed." He further said: "The whole object, manifestly, was to protect a class of day laborers upon works of this description, who depended mainly upon their own labor, and payments at short intervals, for a subsistence, against the failures and frauds of contractors by whom they were employed; *and not those who might, for convenience or profit, employ the labor of others.*" And he came to the conclusion that the plaintiff, in that case, could not recover for the labor of his team or hired servant. Judge COMSTOCK said, in that case: "The statute, we think, gives the remedy only to the person who labors himself for a contractor, and confines it to the price of his own labor, or of that to which the law entitles him."

The plaintiff in that case had recovered, in the Supreme Court, not only for his own labor, but for the service of a four-horse team, driven by himself. The Supreme Court disallowed his claim for the wages of his hired servant, and the services of the team driven by such servant. The Court of Appeals modified the judgment in that case, and reduced it, so that the plaintiff only recovered for his own personal labor, the price or value of which was sixty dollars.

That case is decisive of this. It shows that the plaintiff in this case was not entitled to recover for the labor of his team or servant, but only for the labor performed by himself personally.

It follows that no error was committed on the trial of this case in the County Court, to the prejudice of the plaintiff,

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and that the order of that court, denying the plaintiff's motion for a new trial, should be affirmed, with costs.

So decided.

ANDREW SPROUL, Appellant, v. THE RESOLUTE FIRE INSURANCE COMPANY, Respondent.

(GENERAL TERM, SIXTH DISTRICT, MAY, 1869.)

A new trial, on the ground of newly discovered evidence, should not be granted, when such evidence does not go to the merits, and plainly appear to be relevant to some material issue raised by the pleadings; nor when such evidence is cumulative, or only tends to contradict, on a purely circumstantial point, a witness examined on the trial; nor when circumstances show that by greater diligence on the part of the moving party, or his agent or attorney, the evidence is ordinarily discoverable previous to the trial.

Surprise of counsel at the testimony of a witness is not of itself any ground for a new trial.

Case on motion for a new trial on the grounds of surprise and newly discovered evidence criticised, per BALCOM, J.

In an action for a loss under a fire insurance policy, defendant proved at the trial, the unusual position and flaming of a lamp, fifteen days before the fire, as tending to show an attempt, by plaintiff, at that time, to set fire to the premises; a witness then explained that the position and flaming of the lamp were accidental, testifying that he was present at the time, on account of a sick child of plaintiff's, which died a day or two afterward; and defendant, the verdict being for plaintiff, moved for a new trial, on newly discovered evidence that the child, in fact, died some days before the unusual burning or flaming of the lamp referred to.—*Held*, that the order granting a new trial on this ground should be reversed.

APPEAL from an order granting a new trial on the grounds of surprise and newly discovered evidence. The motion was made on affidavits, and a case which was defective in several particulars. (See opinion.)

The complaint stated a cause of action on a fire insurance policy for \$1,200, issued by defendant upon goods and furniture in a grocery store, in the village of Watkins, Schuyler county, and alleged that all the insured property, excepting

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about thirty dollars worth, was destroyed by fire; and that such property was worth more than \$1,200, for which sum, with interest, judgment was demanded. The answer contained denials, admitted notice of the fire and service of proofs of loss, and set up two separate defenses: 1. That the plaintiff started the fire; 2. That but very few goods were burned.

The jury rendered a verdict for plaintiff, for \$1,049.76, and the defendant moved and obtained an order for a new trial on grounds which, so far as the decision on appeal is founded on them, are fully stated in the opinion. From this order plaintiff appealed.

J. McGuire, for the appellant.

R. H. Marriott and *Chas. J. Folger*, for the respondent.

Present—BALOOM, BOARDMAN and PARKER, JJ.

By the Court—BALOOM, P. J. Whenever a party moves for a new trial, on the ground of newly discovered evidence, he must present a case containing the evidence given on the trial, or the substance of such evidence, with the affidavits on which he relies. (See rule 34.) The evidence, or the substance of it, given on the trial, should be presented, to enable the court to determine whether the newly discovered evidence is cumulative, or material, &c. (See *People ex rel. Oelricks v. Superior Court of New York City*, 10 Wend., 286.) No such case has been made in this action.

The defendant endeavored to prove on the trial that the plaintiff attempted to set fire to the grocery store, in which the insured goods were situated, by means of a lamp, about fifteen days before the fire that destroyed the goods. The lamp was found flaming. The witness, Crum, gave evidence that tended to show that the situation of the lamp was accidental. He testified he was at the grocery store the evening the lamp flamed and burned unnaturally; that he was there administering comfort to the plaintiff's family, on account of

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a sick child the plaintiff then had, that died in a day or two afterward. The family of the plaintiff lived in the same building in which his grocery was kept. The newly discovered evidence, for which a new trial has been granted, is to establish the fact that the plaintiff's child died some days prior to the unnatural burning or flaming of the lamp that endangered the building fifteen days before the fire occurred that burned the insured property.

Now, the time at which the plaintiff's child died was not material to the issue tried, or to that formed by the pleadings. Evidence to contradict Crum in respect to whether the plaintiff's child was living and sick at the time the lamp flamed, would not go to the merits of the case ; and a new trial should not have been granted for newly discovered evidence that the child had died previous to the occurrence of the unnatural flaming of the lamp in the grocery. (See 10 Wend., 292.)

It is impossible to determine, from the appeal papers, whether the case contains all the evidence given on the trial respecting the flaming of the lamp. Whatever evidence there was on that question was given to create the belief that the plaintiff then attempted to burn the insured property, so that it might be regarded as a circumstance against him touching the origin of the fire that burned his goods.

I am of the opinion that the newly discovered evidence, respecting the time at which the plaintiff's child died, is too remote from the issues in the case to warrant the granting of a new trial.

The case does not show the evidence given respecting the quantity of goods burned ; but it is asserted in the plaintiff's points that fourteen witnesses were examined, on the part of the defendant, as to the quantity of goods before the fire, and at the time of the fire.

I think it is clear that all the newly discovered evidence on those questions is cumulative, and furnishes no ground for granting a new trial.

The pleadings, case and affidavits, taken together, show that the fire, which the plaintiff claimed to have burned the

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insured property, happened in the village of Watkins; that the action was tried in that village, and that the defendant's attorney resided in that village from a period prior to such fire, until after the trial; and that all the witnesses examined on the trial, and, also, those since discovered, reside in that village.

The defendant's attorney affirms, in his affidavit, to the effect that he exercised due diligence in preparing for the trial of the action; that the testimony of Christopher Sharp took him by surprise, and that he was greatly surprised by the testimony given by Sharp, &c. But the evidence of that witness is not set out in the case.

An important, strongly contested case is seldom tried without counsel, on the one side or the other, being more or less surprised by the evidence of some witness; but it does not follow that for such a reason a new trial should be granted.

I think, in this case, greater diligence on the part of the defendant, by some agent or attorney, would have enabled the defendant to discover previous to the trial, as far as is usually discovered, all evidence material to the issues in the action that has been discovered since the trial.

My conclusion is, that sufficient facts were not shown for granting a new trial, on the ground of newly discovered evidence, or for surprise; and that the order granting a new trial should be reversed, with costs, and that the plaintiff should have judgment on the verdict in the action, with costs.

So decided.

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FRANCIS L. SPRAGUE v. RANSOM ECCLESTON and EMMET BARROWS, survivors of LUTHER MARTIN, deceased.

(GENERAL TERM, SIXTH DISTRICT, MAY, 1869.)

A justice of the peace has no authority to make the preliminary examination, or to issue his warrant for the apprehension of the reputed father of a bastard, of his own motion, or otherwise than upon the application of the officers designated by the statute, made in the particular case, in which authority is expressly given to such officer or officers respectively to make it. (1 R. S., § 5, p. 642.)

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A mother, and her illegitimate child (born in Otsego county) being chargeable for their support, as paupers, upon the town of McDonough, Chenango county, and provided for by that town at the county poor house in the town of Preston, in Chenango county, the overseers of the poor of the town of McDonough applied to a justice of the peace, of their county, who went to Preston, took the examination of the mother, and thereupon issued his warrant, upon which the putative father was arrested, and brought before him.—*Held*, the justice acted without jurisdiction, and was liable for damages, as were also the overseers who induced him to act.

It seems that if the overseers had brought the mother into the town of McDonough, and had her examination taken there, the plaintiff might have been properly arrested.

The court excluded evidence of the advice of counsel offered in mitigation, but charged the jury that it was not a case for smart money; and the jury gave a verdict for substantially the actual damages proven.—*Held*, no error was committed to the prejudice of defendants.

ACTION for assault and battery, and false imprisonment. One Lydia A. West was delivered of a bastard child, in Otsego county. She was a resident of the town of McDonough, in Chenango county, to which she returned after the birth of the child, and was supported by that town at the county poor house, in the adjoining town of Preston. The defendant, Martin (deceased since the trial), made application to the defendant, Eccleston, a justice of the peace of the county, and the justice went to said town of Preston, and there took Mrs. West's examination, in presence of Martin, and the defendant, Barrows, who were overseers of the poor of the said town of McDonough. The justice issued his warrant on the affidavit of Mrs. West, and plaintiff was arrested as the reputed father of the bastard, and brought before the justice, but was discharged because the evidence of the mother of the child could not then be obtained. On the same day that plaintiff was discharged, he was again arrested, on a warrant issued on the same application and affidavit, and was discharged for the same reason. At the time the application was made, and Mrs. West's examination taken, and the first warrant issued, Mrs. West was not at the poor house, but was working at one Coriel's, in said town of Preston, and had her child there with her. No question was raised as to the mere form of the application, or examination, or warrant.

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The action was tried at the Chenango Circuit, in February, 1868. The defendants offered, in substance, to prove that the justice consulted with counsel, who was employed by the overseers of the poor of the town of McDonough, in the matter, and was advised that he had the right to issue the second warrant. The offer was rejected, and defendants excepted.

The judge charged the jury, in substance, that the proceedings before the justice, and the warrants issued by him, were no justification to the defendants, to which portion of the charge defendants excepted.

The judge instructed the jury, in substance, that if the overseers of the poor had taken Mrs. West and her child to the town of McDonough, and there made the complaint to the justice, they might have had the plaintiff arrested, to which the defendants' counsel excepted.

The judge held that the defendants were liable because Mrs. West's affidavit was taken in the town of Preston, which holding was covered by one of defendants' exceptions.

The judge instructed the jury that the defendants were not to be visited with smart money; but that the jury should render such a verdict as, under the circumstances, they deemed the evidence warranted.

The jury rendered a verdict for plaintiff, for fifty-six dollars damages. The exceptions were directed to be heard, in the first instance, at the General Term; and defendants moved for a new trial on their exceptions.

J. W. Glover and *Horace Packer*, for the plaintiff.

Solomon Bundy, for the defendant Eccleston.

Henry R. Mygatt, for the defendant Barrow.

Present—BALCOM, BOARDMAN and PARKER, JJ.

By the Court—BALCOM, P. J. The bastard child of Lydia A. West was born, according to the evidence of Susan Layton, in the town of Richfield, in the county of Otsego, on the 21st

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day of August, 1864. And the statute is that "the reputed father and mother of every bastard shall be liable for its support; in their default or inability, it shall be supported by the county or town in which it shall be born, as hereinafter provided." (2 R. S., 5th ed., 906, § 2.) According to this statute, the town of Richfield, or the county of Otsego, was liable to support this bastard child. But its mother, subsequently, was a pauper in the county of Chenango, and she had her bastard child with her. The statute then applicable to the case, is as follows: "If any woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable to any county, city or town; or shall be pregnant of a child likely to be born a bastard, and to become chargeable to any county, city or town; the superintendents of the poor of the county, or any of them, or the overseers of the poor of the town or city, or any of them, *where such woman shall be*, shall apply to some justice of the peace, of the same county, to make inquiry into the facts and circumstances of the case." (2 R. S., 5th ed., 907, § 5.) As Mrs. West was not in the town of McDonough at the time the overseers of the poor of that town applied to Justice ECCLESTON to make inquiry into the facts and circumstances of the case, they were not authorized to make such application; and as she was not in that town at the time she was examined on oath by Justice ECCLESTON, he was not authorized, upon such application, to go into the town of Preston, where she was, and take her examination. No persons, except the overseers of the poor of the town of Preston, and the superintendents of the poor of the county, could apply to a justice of the peace of the county to make inquiry into the facts and circumstances of the case while Mrs. West remained in the town of Preston. But neither of those officers applied for the examination. Justice ECCLESTON was not empowered to make the examination on his own motion; and he had not jurisdiction to make the examination or to issue any warrant for the apprehension of the reputed father of the bastard, upon the application of the overseers of the poor of the town of McDonough. And

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as he acted without jurisdiction, he, and the overseers of the poor of the town of McDonough, who induced him thus to act, were liable for the arrests and imprisonments of the plaintiff, which they caused by their proceedings.

It was held in *Wallsworth v. McCullough* (10 Johns., 93), that a justice of the peace is liable to an action for false imprisonment for issuing a warrant, by virtue of which the putative father of a bastard child is arrested, upon the application of an attorney who was not authorized by the overseers of the poor to make the application.

That case sustains the charge to the jury in this, that the defendants were liable to the plaintiff for his arrests and imprisonments. (See, also, *Reynolds v. Orvis*, 7 Cow., 269; *Bigelow v. Stearns*, 19 Johns., 39.)

There was no evidence to impute bad faith to the defendants; and the proper inference from the evidence is, that they acted honestly, and under the belief that all they did, in the proceedings against the plaintiff, was in the proper discharge of their duties as public officers.

The evidence showed that the plaintiff paid thirty-three dollars, or over, to counsel in the proceedings in which he was arrested, besides some other expenses; and that his time was worth \$2.50 per day, during the days he was under arrest.

The verdict of the jury was for only fifty-six dollars damages; and I am of the opinion the jury only awarded actual damages to the plaintiff.

If I am right in this conclusion, the supposed error of the judge, in rejecting the defendants' offer to show that Justice Eccleston was advised, by counsel employed by the other defendants, that he had a right to issue the second warrant, did not affect the defendants on the question of damages.

The judge charged the jury, in substance, that the proceedings of the defendants were properly in evidence for the purpose of showing that they acted in perfect good faith, and in pursuance of what they supposed was their duty, and that, therefore, they should not be visited with smart money; and

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I think the jury did not include any vindictive or punitive damages in their verdict.

My conclusion is, that no error was committed on the trial to the prejudice of the defendants; and that their motion for a new trial should be denied, with costs.

So decided.

JOHN WARREN, Respondent, v. LUTHER S. SABIN, Appellant.

(GENERAL TERM, THIRD DISTRICT, MAY, 1869.)

Plaintiff and defendant owned and occupied contiguous premises, facing a highway; defendant drove a post, partly on the plaintiff's land, at the point where their front fences came together, claiming the right to maintain it there, as part of his front fence. In an action by plaintiff, to recover damages for trespass, on account thereof—*Held*, the jury were rightly instructed that the post was not part of a division fence.

The rule as to division fences permits them to be placed equally on the land of each adjoining owner.

It has its foundation wholly in the statute, and does not apply to fences meeting on the front of adjoining premises. Such fences are required to terminate at the division line.

APPEAL by defendant from a judgment entered upon a verdict at the Rensselaer Circuit. The action was to recover damages against defendant for his driving a post on plaintiff's land.

The answer denied that it was plaintiff's land, and claimed that the land where the post was driven was the property of defendant's wife, by whose authority the post was driven. The parties were occupants and owners of adjoining lands, and maintained, by agreement between them, equal portions of a division fence.

The plaintiff recovered a verdict for nominal damages, and the defendant appealed to this court.

F. Rising, for the appellant.

R. H. Parmenter, for the respondent.

Present—MILLER, INGALLS and PECKHAM, JJ.

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By the Court—PROKHAM, J. The only point made upon this appeal is the alleged error of the justice, at the trial, in charging the jury, that the plaintiff was entitled to recover if the post, or any part of it, was upon the plaintiff's land; and in refusing to charge to the contrary, or to charge that that post was part of a division fence, and, hence, that defendant had the right to place it half on one side and half on the other side of the line between the parties. The justice, at the trial, charged that the defendant had the right to put the post there, in part, upon the plaintiff's land, "if it was put there for the division fence, or for part of the division fence, or for a division line." But the court added that it did not regard this post as part of a division fence or line between the parties. This part of the charge, and of the refusal to charge, was excepted to by the defendant.

Was it right? In my opinion it was. The doctrine as to division fences being placed partly on the land of each owner, has its foundation entirely in the statute. Our statute provides that "where two or more persons have lands adjoining, each must maintain a just proportion of the division fence between them."

Under this statute it is clear, upon principle and authority, that the owners are bound to erect and maintain a line or division fence, and should make it equally upon the lands of each. The difficulty in the defendant's case seems to be that on the north side of this lot conveyed to plaintiff, there was no division fence, and could be none. On the north side their lands did not "adjoin." They adjoined only on the westerly line of the plaintiff's, and the easterly line of the defendant's land. The northerly side of plaintiff's land adjoined the public highway. It is not pretended that this post complained of was put there as any part of the fence running north and south, which was and could be the only division fence between the parties; the only fence between adjoining lands. It was claimed to be a part of the defendant's fence, running on the north side of his lot. If it were a part of that fence (of which I am not satisfied on the

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evidence; it seems to have been put there simply to obstruct the plaintiff's gate; to assert the defendant's right to place it there) there was no necessity for putting any part of it on the plaintiff's land. The fence of the defendant on that line should run up to the line on one side, and the plaintiff's fence should run up to the same line from the other direction, to meet the defendant's fence. Such a fence is in no sense a division fence, and the statute has no sort of application to its location. (*Nowell v. Hill*, 2 Met., 180.)

This being the only point urged or presented in the points, as a ground for reversal, the judgment must be affirmed.

Judgment affirmed.

CORNELIUS D. HICKS, Respondent, v. ROBERT C. DORN,
Superintendent of Canal Repairs, Appellant.

(GENERAL TERM, THIRD DISTRICT, MAY, 1869.)

In the use of means to restore a canal to a navigable condition after it has been determined that there is an obstruction requiring removal, a superintendent of canal repairs acts ministerially, and is liable for damages if he unnecessarily adopts such a remedy, or proceeds in such a manner as to injure private property.

To justify the injury or destruction of private property, there must exist a pressing public necessity both as to the act to be done and the manner of doing it; and whether such a necessity existed is a question of fact to be determined from the circumstances of the case.

Accordingly, where plaintiff's boat had grounded (without his fault), between the gates of a dry dock, opening into a basin of the canal, and thus prevented navigation; and the superintendent, acting in good faith, and doing no more injury than the act required, destroyed the boat; and it appeared that other methods were practicable, and might have been adopted by him, without serious detriment to the public interests, which did not necessarily involve injury to the plaintiff's boat—*Held*, the superintendent was liable for the value of the boat.

THIS was an appeal by defendant, from a judgment rendered in favor of plaintiff, on the report of a referee, for \$2,131.95. On the 19th of May, 1865, the defendant was superintendent

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of canal repairs, in charge of section two, of the Erie canal, including the portions thereof hereafter mentioned, under instructions from the canal commissioners to act promptly whenever a break occurred, and restore the canal to a navigable condition as speedily as practicable, at all hazards. At Vischer's Ferry the canal runs nearly east and west. On the northerly side of the canal was a basin, forming part of the canal itself, covering about half an acre. At the northerly point of the basin were two lock-gates, belonging to the State, separating the basin of the canal from a dry dock, covering about a quarter of an acre, the private property of one Alexander Sherman, into which boats were taken from the canal for repairs. These lock-gates opened southerly into the canal. On the easterly side of Sherman's dry dock he had a waste-weir for letting off surplus water. A short distance west of the dry dock was a culvert, under the canal, the property of the State, through which, from the north, a creek, called Stony creek, ran into the Mohawk river, southerly of the canal. The lock-gates, owned by the State, were used as a waste-weir to let off the water from the canal, which passed into the dry dock, and out of that, through the gates thereof belonging to its owner, into a ravine, through which it ran into Stony creek, above the culvert. The creek was of considerable size, and above the culvert fell rapidly. The State kept no one in charge of the lock-gates, but they were opened by Sherman, and those in his employ, to let boats from the basin into the dry dock, they immediately thereafter closing them again. On the 18th of May there was a severe spring rain, which raised the water in the river, creek and canal, creating a freshet, filling the canal so that the water ran over its banks. This was the condition of the river, the creek and the canal, on the 19th of May. Two or three days previous to the 19th, the plaintiff's canal boat, the "G. W. Ganung," had been thus run from the canal into this dry dock for repairs. On the 19th of May, the canal was in a navigable condition the whole length thereof, and a large number of boats were

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navigating it. On that day, when the canal, the creek, and the river were in such a swollen condition, the canal lock-gates were opened by Sherman's men in charge of the dry dock, and the captain and crew of plaintiff's boat commenced running her, stern foremost, into the canal. When she was nearly half way through the gates, the waste-weir and gates of Sherman's dry dock suddenly gave way, creating a large breach in the bank thereof; in consequence of which the water ran rapidly out of the dry dock and of that, a three mile level of the canal. This left the boat between the open gates of the canal, resting upon the miter sill. She was about ninety-five feet long; about forty-five feet lay in the basin of the canal, and the remainder in the dry dock. The lock-gates of the canal could not be closed, and navigation thus resumed, until the boat was removed. The defendant was notified of the break, and arrived on the ground about nine o'clock in the morning. He examined and deliberated upon the situation, and upon the several modes of restoring the navigation of the canal. Four methods were possible: 1. To dam up the culvert under the canal, so as to raise the water above it high enough to set it back up the ravine into the dry dock and level of the canal; deep enough to float the boat. This would have been only an experiment, and, if successful, would have been fraught with danger to the canal. 2. By repairing the banks of Sherman's dry dock, which might have been done in two days, so as to have permitted sufficient water to have been let into the canal and dry dock to float the boat out of the gates, so they could be closed, and navigation resumed. 3. By building a coffer dam, in the basin of the canal, around the stern of the boat, which could have been done in two or three days, at a cost of \$900, and \$250 to \$350 for removal. 4. By cutting out of plaintiff's boat a piece thereof of sufficient length to enable him to close the gates between the canal and the dry dock, and let the water into the level, which could be done in about twelve hours. This involved the destruction of property, the value of which did not much

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exceed the expense of restoring navigation in either of the other ways. The defendant, in good faith, exercised his judgment and discretion in the premises, and in good faith determined that the best method of restoring navigation was to cut out of plaintiff's boat a piece large enough to enable him to close the gates of the lock. He ordered it done, and it was done, without any want of care in the act of severing the boat; the pieces cut out being just long enough to allow the gates to be closed. The injury done to the boat was no greater than the act necessarily involved. Every day's delay in restoring navigation caused great damage to the State and to persons navigating the canal. The plaintiff's boat grounded in the gates of the lock, without any fault or negligence on the part of the plaintiff or his servants or agents; he was not notified to remove the boat, and no time nor opportunity was given him to do so. No evidence was given on the trial that at or prior to the time defendant commenced cutting up the boat the plaintiff, or his servants or agents, had commenced removing it from between the lock-gates or had taken any steps to do so, or that when defendant commenced removing it they designed to or would do so. The defendant, at the close of plaintiff's testimony, moved for a nonsuit, and again at the close of the evidence. The motions were denied, defendant each time excepting. The referee assessed plaintiff's damages at \$1,500 and interest from the time of cutting up the boat. As conclusion of law, he held defendant liable, to which he excepted, and on the entry of judgment appealed therefrom to this court.

N. C. Moak, for the appellant.

Isaac Lawson, for the respondent.

Present—MILLER, INGALLS and PECKHAM, JJ.

By the Court—INGALLS, J. It was the duty of the defendant, as superintendent of repairs on the Erie canal, to remove obstructions which hindered or prevented navigation thereon.

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(*Adsit v. Brady*, 4 Hill, 630 ; *Fulton Fire Insurance Co. v. Baldwin*, 37 N. Y., 648.) It was not only made his duty by law, but he was expressly instructed by the canal commissioners to discharge that duty. The referee finds that the defendant acted in good faith in all that he did, and the injury to the plaintiff's property was no greater than the act necessarily involved. The defendant properly determined in regard to the necessity and propriety of removing the defendant's boat as an obstruction, and can only be held responsible upon the ground that he was chargeable with negligence, or improper conduct in executing the work. The right of an individual in regard to his property should be respected ; and even public officers are not at liberty to disregard such rights, unless there is a clear and urgent necessity therefor, to subserve an important and pressing public necessity. Mere convenience on the part of the public in regard to the mode to be adopted in accomplishing a result, would not, in my judgment, create such a necessity as would justify a material injury to, or destruction of, the property of an individual. Certainly not, if any other legitimate mode could be resorted to, and produce the same result, without serious injury to public interests. In other words, there must exist a pressing necessity, both in regard to the work to be performed, and the manner in which it should be executed, to justify such an act. No other rule would be safe, or furnish adequate protection to the citizen, against the encroachment of superior power. It is not pretended that the plaintiff was guilty of negligence, or improper conduct, in the management of his boat. The question therefore, presented for the determination of the referee was, whether, in view of all the circumstances, it was necessary for the defendant to destroy the plaintiff's boat, in order to remove it, as an obstruction to navigation. In determining this question, it became necessary for him to ascertain, from the evidence, whether the defendant could not reasonably have adopted some other method to accomplish the same result, and thereby avoided doing the plaintiff such serious injury. If the defendant could have repaired the breach occasioned

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by the water, by a resort to *ordinary means*, and thereby continued navigation, without material interruption, or serious detriment to the public welfare, it certainly was his duty to have done so, instead of adopting this *extraordinary* measure, so fraught with injury to the plaintiff. The evidence discloses, and the referee has found, that there were several methods by which the obstruction could have been removed, and the difficulty obviated, which were brought to the attention of the defendant before he entered upon the work. One was, by constructing a coffer dam in the basin of the canal, around the stern of the boat, and raising the water so as to float the boat, which could have been accomplished in two or three days, at an expense of \$900, and \$250 or \$300 to remove the dam. Another was, to repair the banks of the dry dock, which could have been done in two days. Another, by damming up the culvert, and thereby raising the water so as to float the boat and close the gates. It appears, that from eight to ten hours were expended in cutting the boat, and about twelve hours to restore navigation, and plaintiff was damaged to the extent of \$1,500. There is considerable evidence, bearing upon the feasibility of the several methods. In my opinion, a fair question of fact was presented for the determination of the referee, whether, in view of all the circumstances, the defendant exercised reasonable prudence in executing the work in question; whether he was justifiable in pursuing an extraordinary, rather than an ordinary method, in removing the obstruction. The evidence shows pretty clearly that, with possibly some additional delay and expense, the work could have been accomplished, and the plaintiff's property preserved. Is it just or reasonable to conclude in this case, that there existed, what Senator Sherman, in his opinion in *Russel v. The Mayor, &c., of New York* (2 Denio, 475), denominated "an overruling necessity," which justified the sacrifice of the plaintiff's property? I am of opinion that, at least, the evidence does not so far preponderate, in that direction, as to call upon this court to reverse the decision

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of the referee, in that particular. In what the defendant did, after he determined the necessity of removing the obstruction, I think he must be deemed to have acted ministerially, and was, therefore, bound to exercise reasonable care, prudence, and discretion, in performing the work. (*Barton v. The City of Syracuse*, 36 N. Y., 54; *Robinson v. Chamberlain*, 34 N. Y., 389; *Rochester W. Lead Company v. City of Rochester*, 3 N. Y., 463.)

Due regard for the interests of the public, by public officers, is commendable, and they are entitled to reasonable protection, when acting within the scope of their authority, and in good faith; but the rights of the citizen should not be disregarded, by improperly imposing upon him a burden which should be borne by the State. The plaintiff was free from blame, and the expense of the work in question was properly chargeable to the State; and under the facts of this case, the defendant was not justified in destroying the plaintiff's property, and thereby subjecting him to the loss, instead of, by some other means, removing the obstructions at the expense of the State. Whether the State will allow its servant, who has acted in good faith, and but too strictly in its favor, for the interest or even the right of the plaintiff, to suffer, is not for us to speculate upon. The judgment should be affirmed, with costs.

Judgment affirmed.*

THE PEOPLE ex rel. CHARLES A. BENJAMIN et al. v. THOMAS HILLHOUSE, Comptroller.

(GENERAL TERM, THIRD DISTRICT, MAY, 1869.)

On an appeal by the supervisors of the town of Watertown (under § 13, Laws 1859, chap. 312) from the decisions of the supervisors of Jefferson county, in the equalization of assessments, the comptroller made his determination, upon proofs taken before a referee, appointed by him for the purpose—*Idet.*, the statute gave him authority to do so.

* This decision was affirmed by the Court of Appeals, at the March Term, 1870.

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The comptroller's decision upon the appeal, having been brought into this court for review upon a common law *certiorari*, it appeared from the return that he had united the personal and real estate, and thus had allowed the deduction of too large a sum from the amount assessed on the town by the county supervisors; the court corrected the comptroller's error, and modified his determination accordingly.

THESE proceedings came before this court by *certiorari* to the comptroller, to review his decision upon an appeal made to him by the supervisors of the town of Watertown, in Jefferson county, from the decisions of the board of supervisors of said county, in the equalization of the assessment rolls for 1866.

The board of supervisors assumed to equalize the assessment rolls of the different towns of the county of Jefferson, and the town of Watertown complained that injustice had been done to it by the action of said board in the premises. The tax thus apportioned to the town of Watertown, and paid by it, was \$54,169.41. It claimed that the amount should have been only \$32,977, and thus that there was an overpayment of \$21,192. The comptroller, on the appeal to him, did not take the testimony himself, but appointed a referee to take it and report the same to him. The referee took the evidence of the parties, of the board and of the town, and reported it to the comptroller. The comptroller decided that the claim of the town was right, and ordered its allowance by the board accordingly.

Brown and Beach, for the relators.

J. F. Starbuck, opposed.

Present—MILLER, INGALLS and PECKHAM, JJ.

By the Court—PECKHAM, J. It is insisted by the board here, that the whole action of the comptroller was void, because he had no authority to appoint a referee to take the proof.

I think the objection without force. It is made the duty of the comptroller, on such appeal from the action of the

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board of supervisors, "to hear the proofs of the parties," and, "after hearing such proofs, he shall determine," &c. But the "proofs may be presented in the form of affidavits, or otherwise, as *he shall direct*." (Laws of 1859, p. 705, § 13.)

It is clear that the comptroller could not himself attend in the different counties and take the proof, nor was it expected or intended by this act, that the witnesses should be called from the distant parts of the State, to the capital, to be examined there by the comptroller. The act intended to vest in him the power to exercise a sound discretion, as to the mode and manner in which the "proofs" should be brought before him. I see no objection to this mode, and think his discretion well exercised.

On the part of the comptroller and the town of Watertown, it is insisted that as the facts stated in the return, show that he had jurisdiction of the case, of the parties and of the subject matter appealed to him, his action in the matter must be affirmed; that this court has no power, upon a common law *certiorari*, to review or correct any error committed by the comptroller upon the merits; that this court could not and would not examine the evidence though it was returned, excepting so far as was necessary to show that the comptroller had jurisdiction.

Whatever may have been regarded as the law, up to the decision of the two cases of *The People v. The Board of Police* (39 N. Y., 506), and *The People v. The Board of Assessors of Brooklyn* (39 N. Y., 81), I think these cases entirely dispose of this objection.

Upon the merits, it seems to be entirely clear, that the referee and the comptroller who adopted his views, made a plain mistake. This occurred by reason of uniting the personal with the real property, in equalizing the assessment as to Watertown. In looking at the real property alone (and neither the board nor the comptroller had any right to look at the personal), it is clear that the comptroller ordered too large a sum to be deducted from the tax of Watertown. This, as I have said, was caused solely by mixing the personal and real

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tax together. It appears by the facts and figures in the return of the comptroller, that the whole tax the board imposed upon that town, was \$54,169. This includes both the real and personal tax. The amount of tax on the town, assessed and paid for real estate alone was \$36,511. But it should have been, at the proper rate when properly equalized, \$23,020. Hence the excess of the tax on the town (deducting this true from the excessive tax) is \$13,491. The statute declares that "after hearing such proofs, the comptroller shall determine, whether any, and if any, what deductions ought to have been made from the corrected valuations of such town, city or ward;" and in after years the town, &c., shall get the benefit of the determination, if in its favor. The comptroller, therefore, should have "determined" that said sum of \$13,491 was the amount or "deduction" that ought to have been made from the corrected valuations of said town of Watertown; and this court so orders and corrects and modifies the determination of the comptroller accordingly.

MYRON P. STILES v. STEPHEN STILES, PHILANDER STILES, and
SETH BEEMAN.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

A sale of infant's real property having been made and completed, under proceedings before a County Court, a subsequent order of the same court, directing the special guardian to invest the proceeds, in land outside the county over which its jurisdiction extends, the infant and special guardian being at the time resident in the county where such land is located, is a nullity.

Whether proceeds of a judicial sale of infant's real property, remaining in the hands of the special guardian, can be regarded as land, under 2 R. S. 195, § 180, in such sense as to give a County Court power to direct the disposition thereof. *Quere.*

The power of County Courts, under § 80, sub. 6, of the Code, for sale, etc., of an infant's real estate, includes all incidental powers and the use of means necessary to complete the sale, by transferring the infant's title, and securing to him the avails of his interest in his estate. Per JOHN-SON, J.

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But, whatever is done in this respect, must be done when the parties and subject matter are before the court; and as part of the proceedings to sell, etc. The security then deemed necessary, if given, or investment ordered, if made, is the judgment of the court; its powers are exhausted thereby, and its jurisdiction over the parties and subject matter is at an end. *Id.*

Rule 69 of this court refers to proceedings at the time of sale. *Id.*

At least, it can control County Courts, only as so applicable; it cannot enlarge their statutory powers. *Id.*

The powers conferred by 2 R. S., 195, § 179, upon the Court of Chancery, through which the infant is made a ward of that court, from the time of the application, for the purposes enumerated in the statute, have not been expressly given to the County Courts, and cannot be implied from mere power to sell infants' lands.

A special guardian, appointed on the judicial sale of a minor's real property, being liable for money received therefrom, conveyed to one of the sureties upon his bond, a farm, subject to a mortgage, upon trust, that the surety reimburse himself from the rents and profits, or proceeds thereof, for such sums as he might be required to pay by reason of liabilities of the latter, on the grantor's account. The farm was then conveyed by the surety to the minor, under agreement between them and the special guardian (who was insolvent), that it should satisfy the bond, and discharge the special guardian and his sureties from liability thereon. The mortgage being afterward foreclosed, the surety purchased at the foreclosure sale, and went into occupation; the minor, attaining his majority, elected to ratify the agreement and deed pursuant thereto.—*Held*, The purchase by the surety was voidable by the minor, when he came of age. The ratification by the minor, at his majority, did not, by relation to the time of the conveyance, cut off his equitable right, to claim the purchase by the surety as made for his benefit.

THIS was a motion, at General Term, for a new trial upon a case and exceptions, under sub. 1, § 268 of the Code, as amended in 1867.

Myron P. Stiles brought the action against Stephen and Philander Stiles, and Beeman, demanding reconveyance of a farm of 325 acres of land, in Ontario county, in Stephen's possession, and, for rents and profits thereof; or, failing that relief, the sum of \$3,500, with interest. There was a trial before a judge at Special Term, and the following facts appeared.

On the 14th June, 1853, the County Court of Yates county ordered a sale of real estate, situate in that county, belonging

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to the plaintiff, then about nine years of age. Philander Stiles, the plaintiff's father, who, as next friend, had petitioned for the sale, was appointed special guardian, executed the usual guardian's bond, in which the defendants Stephen Stiles and Beeman, joined as sureties; and, May 9th, 1854, sold and conveyed, under the order, for \$2,000. The order directed the residue of the proceeds, after deducting expenses, to be put out at interest.

On the 8th January, 1863, Philander, being owner, conveyed the farm in question, subject to a mortgage held by Hobart College, to Stephen, in trust, to apply the rents and profits, or the avails of any sale thereof, to the payment of certain debts owing by Philander, for most of which Stephen was liable, as his surety, and to reconvey the residue.

On the 1st February, 1863, the money received by Philander as special guardian, amounted, with interest, to about \$3,500, and no portion of it had been paid over. An agreement was then made between the plaintiff, still under age, Stephen, and the special guardian, who was insolvent (all at this time residing in Ontario county), in pursuance of which an order was obtained from the Yates County Court, directing the special guardian to invest the plaintiff's said money in a purchase of the farm held by Stephen in trust; the conveyance, when made, was, by the agreement, to be in satisfaction of the special guardian's bond, and of the other defendants' liability thereon, as sureties. The order was procured upon the joint application of the plaintiff and his special guardian. A conveyance was made, in pursuance of it, by Stephen to the plaintiff, February 6, 1863, and Philander occupied and used the farm by arrangement between himself and plaintiff.

Default was made in payment of interest on the Hobart college mortgage; it was foreclosed, and at a sale made under the decree, June 3d, 1864, Stephen became purchaser, and soon after took possession. After the sale, plaintiff attained his majority, and affirmed the agreement and conveyance to him in pursuance thereof, and demanded

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possession of Stephen, which was refused. Judgment was given for the plaintiff, directing such reconveyance as might be necessary, an accounting for rents and profits, with just allowances to defendants, and declaring plaintiff entitled to possession of the farm.

H. O. Cheesebro, for the plaintiff.

Herron & Hubbell, and *H. R. Selden*, for the defendant, Stephen Stiles.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. It must be admitted, I think, that if the defendant had, by virtue of the order of the County Court of Yates county, dated Feb. 5th, 1863, and his subsequent conveyance of the farm in said order mentioned, to the plaintiff, become completely exonerated and discharged from all further liability upon the bond executed by him, as surety for the plaintiff's special guardian; and also from the trust under which he had, before such conveyance, held such farm, and was from that time under no further obligation, and owed no further duty to the plaintiff, his purchase of the farm afterward, at the sale under the foreclosure of the Hobart college mortgage, was valid, and vested a perfect title in himself, free from any claim or liability to account to the plaintiff, or any one else. If his obligations and duties had, before that time, all been performed and fulfilled, according to law, both as respects the bond and the trust upon which he held the land, he was as much at liberty to purchase for himself as any third person, and to retain all the benefits and advantages thereof, as exclusively as though he had, before that time, been an entire stranger to the plaintiff. This, I think, will be found to be the rule, in a case of this kind, according to all the authorities. His former relation, it is obvious, did not give him any peculiar means of information, nor had he acquired any which was not possessed by all the other parties to the transaction.

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But I am clearly of the opinion that he had not, at the time of such sale and purchase, under the mortgage foreclosure, fulfilled all his obligations to the plaintiff, and that the same were still subsisting and in force, and the corresponding duties remained undischarged. The plaintiff had not, at that time, attained his majority, and was wholly incapable, either of affirming or disaffirming what had been done with him or in his behalf. It was, then, wholly uncertain whether he would sanction the transaction or not; and if his sanction was necessary to complete the performance, and satisfy and discharge the obligation of the bond, such bond remained of force until the sanction was given. If, however, the order of the County Court was a valid order, the conveyance having been made in pursuance of it, I do not see that the ratification of the transaction by the plaintiff was of any importance, or that his assent or dissent could affect the matter in any way, any more than it could the sale of his land originally, under the order of the same court, in 1853. If the court had jurisdiction, its judgment was conclusive, and the order, when executed and carried into full effect, was a complete and final disposition of the whole matter, binding upon all the parties in interest, who were before the court. But it seems to me quite clear that the order in question was not a valid order, and that the court by which it was made had no power or jurisdiction to make it. The County Court is a court of special and limited jurisdiction; it is the mere creature of the statute, and has no other power than that which the statute has conferred. (*Frees v. Ford*, 6 N. Y. R., 176.) Indeed, the statute, by which these courts are created, declares in express terms, that they "shall have no other jurisdiction than that provided in the next section." The succeeding section provides amongst other "special cases," and gives the power "for the sale, mortgage, or other disposition of the real property situated within the county, of an infant, or person of unsound mind." This is all the power conferred. It is too plain for argument that the power which the court undertook to exercise in granting the order

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in question, was quite other, and different from that of selling, mortgaging, or otherwise disposing of the lands of this infant situated in Yates county. His lands situated in that county had been sold ten years before, and the proceeds of such sale had remained, and then were in the hands of the special guardian appointed for such sale. The case shows plainly that all the parties, the plaintiff, the special guardian, and his surety, the defendant, at the time of the making of this order, resided in Ontario county; and the order undertakes to direct, that the special guardian shall invest the moneys of the infant in his hands in the purchase of lands, situated in the county of Ontario, and have them conveyed to the infant. In other words, to compel the infant to take a conveyance of lands heavily encumbered, situated in another county, in satisfaction of the bond given for his benefit. It needs but a simple statement of the matter to show conclusively that the whole proceeding was a nullity, and entirely beyond any power conferred upon the court. No amount of ingenuity, or force of reasoning, can, as it seems to me, change this. It was not land at the time, but money in the special guardian's hands. But even if the avails of the sale in 1853 could still be regarded as land under the provision of the Revised Statutes (2 R. S., 195, § 180), it was not situated in Yates county. The infant and the special guardian, as has been already said, were residents of another county, and the land which was the subject of the order was also out of the county, and beyond the territorial jurisdiction of the court in respect to infants' lands. The County Court had exercised and exhausted all the power it ever had on the subject, when the sale ordered was completed, ten years before. The transaction was then complete, and the rights of all the parties fixed. The purchaser became vested with the title to the plaintiff's lands, and the rights of the plaintiff vested in the bond of the special guardian and the sureties thereto, which the court had ordered to be given for his benefit and security. The proceeding, in which the order in question was made, was not the same proceeding, but a new, and

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original one, for a different object and purpose. It had no relation to the sale of infant's lands, situate in Yates county, or to mortgaging, or otherwise disposing of the same, for he had none in that county. It was for the purpose of disposing of the infant's money by converting it into land, and of compelling the infant to purchase land with such funds, by way of relieving the special guardian, and his sureties, from their obligation to the infant upon their bond. This power, as a distinct and independent power, is not conferred by the Code, and consequently not possessed by such courts. The power to sell, mortgage, or otherwise dispose of the real estate of an infant, conferred upon these courts, includes, undoubtedly, all incidental powers and use of means, necessary to complete such sale, by transferring the title of the infant to the purchaser, and securing to the infant the avails of his interest in his estate. But, whatever is done in this respect, must obviously be done when the parties and the subject-matter are before the court, and as part of the proceeding to sell, or otherwise dispose of the infant's estate. The security which the court then deems necessary for the infant, if given, or the investment ordered, if made, is the judgment of the court on that question; and such court cannot afterward in another proceeding, make a new disposition of the fund, any more than a justice of the peace can modify or correct his judgment after it has been rendered, upon reconsideration, or a new hearing in respect to some parts of it. The power has been exercised and expended; and the jurisdiction of the court over the parties and over the subject-matter, is at an end. We are referred to the 69th rule of court, as affording some authority for the proceeding. But I do not see that it helps the defendant's case. That rule, it will be seen, refers to proceedings at the time of the sale, and prescribes how the avails shall be disposed of, as part of such proceedings, while the parties therein are yet before the court. But if it were held to be otherwise, and to relate as well to future proceedings, to secure the funds of infants, who are wards of the court in which the proceedings are had,

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it could make no difference, as those rules only control County Courts, so far as they may apply to, and be consistent with, the powers granted to such courts by the statute. The judges, who are authorized to make rules, cannot confer thereby powers, upon County Courts, which the statute has not given either in terms, or by necessary implication.

The power given to the Court of Chancery, by the Revised Statutes, on the subject of the conveyance of lands by infants, and of the sale and disposition of their estates, and which is now vested in the Supreme Court, has nothing to do with the power conferred upon the County Courts. The powers granted to the County Courts are neither limited nor enlarged by the provisions of the Revised Statutes. They are simply original powers confined within the limits expressed, and wholly unaffected by similar powers conferred by statute upon other courts. (*Davis v. Spencer*, 24 N. Y. R., 386.) The plaintiff was not a ward of the County Court, as the statute has not conferred the power of guardianship upon it, over infants in such cases. These courts cannot take power by implication, but it must be expressly conferred in every instance. By the Revised Statutes (2 R. S., 195, § 179), the infant was made the ward of the Court of Chancery, from the time of the making of the application to the courts, for the sale, so far as relates to the property, its proceeds and income, but no further; and the court is expressly authorized to make orders for the application and disposition of the proceeds of such property, and for the investment of the surplus belonging to such infant, and to require accounts to be rendered periodically by any guardian or other person, who may be intrusted with the disposition of the income of such proceeds. These powers have not been given to the County Courts, and are not embraced within the mere power to sell infant's lands within the county. To authorize a transfer of title is one thing, but to control and administer the proceeds afterward as guardian, is quite another and different power. The former power certainly does not include the latter. The order of the County Court being void and of no

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effect, the case stands simply upon the footing of a voluntary arrangement between the parties for the conveyance of the land in question to the plaintiff, then an infant, in satisfaction of the guardian's bond to him, or for his benefit. It did not and could not operate as a satisfaction of such bond, until the time arrived when the plaintiff was competent to accept and ratify, and then only in case he did so accept and ratify. Then, and not till then, was the bond satisfied and the guardian and his sureties discharged. Until that time, all the duties and obligations of the guardian, and of his sureties, remained unfulfilled and undischarged, and the relation of trustee and *cestui que trust* continued. Viewed in this light, the rights of the plaintiff appear extremely clear. The defendant's purchase, under the mortgage foreclosure, was made while this relation of trustee and *cestui que trust* existed. He was the surety of the trustee, and bound for the performance, by the latter, of all his duties and obligations growing out of the relation. The guardian was insolvent, and had conveyed this farm to the defendant in trust, to indemnify him against his liability as such surety; and the main object, as plainly appears from the evidence, was, that this farm might be conveyed to the plaintiff, in satisfaction and discharge of the obligation of both the guardian and surety. It was so conveyed, and the conveyance must and would so operate, provided the plaintiff should sanction the transaction when he should become enabled legally to speak on the subject. It was his property, to all intents and purposes, at his option to retain it. Neither the defendant nor the special guardian could take it away from him, or control it. It was in his hands a security in equity, for the fulfillment of the bond of his guardian, until he chose to relinquish it or retain it on becoming of full age. In this situation of things, it is clear enough that the special guardian could not purchase this farm at a hostile sale, for himself, and deprive his ward of the security, or of the title. If he attempted to make such purchase, in his own right, the law would not allow it, but would hold it to be a purchase for the ward, if the latter

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chose to take it, in whatever form such purchase was made and consummated. The authorities on the subject are so numerous, that I shall undertake to cite only a very few, in our own courts: (*Evertson v. Tappen*, 5 Johns. Ch. R., 498; *Torrey v. Bank of Orleans*, 9 Paige, 650, aff'd. 7 Hill, 260; *Van Epps v. Van Epps*, 9 Paige, 238; *Campbell v. Johnston*, 1 Sand. Ch., 148; *Chapin v. Weed*, 1 Clark, 464.) These well settled principles apply, I think, in full force, to the defendant, under the circumstances of this case. He was in legal privity with the special guardian, and bound for him, in respect to the performance of the original trust. He received the farm upon a trust from the special guardian, to enable him to discharge his obligation. If the plaintiff had disaffirmed the transaction on arriving at his majority, he would have been under the necessity of conveying it back to the defendant, to hold upon the same trust, and by way of security for himself and for the plaintiff. In this condition he could not purchase in hostility to the rights, either of the special guardian or of the plaintiff. He could not, by his own act, affect either the vested or the contingent rights of either of those parties. He was under a double disability to benefit himself in the transaction. The defendant's trust, as to the farm, was ended by the conveyance to the plaintiff, at the request of the special guardian, only contingently. It depended altogether upon the plaintiff's subsequent ratification. His purchase was, therefore, in law, a purchase for the plaintiff's benefit, inasmuch as the plaintiff has elected to keep the farm and ratify the arrangement, and the conveyance to him. Even if the defendant intended to purchase in his own right, and for his own exclusive benefit, the law will overrule the intended wrong, and make it subservient to the ends of justice and morality. It is one of the cardinal offices of equity, where it has jurisdiction, to compel men, even if they do not love justice, to practice it in their dealings with their fellow men. It is claimed, however, that the plaintiff has deprived himself of the advantage of the equitable rule, by his affirmance of the transaction by which the land was

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conveyed to him by the defendant. It is argued that this ratification goes back to the original transaction, and places the parties in the same situation in which they would then have stood, had the plaintiff been, at the time, of full age; and the defendant must be regarded, in law, as having, at that time, been fully discharged from all his obligations to the plaintiff, and all his relations to him. This is exceedingly technical, when applied to a case like this. The deduction is that the plaintiff, when he became of age, deliberately chose to give the defendant all his estate, and retain nothing for himself. This will hardly do, and does not need any elaborate answer. By ratifying the purchase, he elected to take the title as it was when it first came to him, with all the protection which the law had given to it, while in his hands, with the questions of acceptance, and the determination of the defendant's obligation, and of his trust, in abeyance. The law had already made the defendant's purchase the plaintiff's, in case the latter elected to keep the land. If the rule were otherwise, it would work the most palpable injustice, and be a reproach to the law. Unless the plaintiff's title can be upheld and maintained against the defendant, this would, to use the language of Lord Chancellor THURLOW, in the leading case of *Fox v. Mackreth* (2 Bro., C. C., 400), be a transaction "such as cannot be endured out of a court of justice; and if a court does affirm such transactions, it cannot be the heart of a judge which affirms it, but it must be done from a fear of laying down such rules as may tend to make the general transactions of mankind too insecure." No title had vested in the defendant, by virtue of his purchase at the foreclosure sale, either as against the plaintiff, or as against Philander Stiles, in equity, when the time for the election of the plaintiff had arrived; and certainly it did not vest in him by virtue of the plaintiff's choice to have the land for himself. The defendant, by purchasing at the foreclosure sale, had either put it out of the power of the plaintiff to affirm or disaffirm the conveyance to him, at his majority, and so remained liable upon the bond, or he

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held under his purchase, subject to the plaintiff's election to affirm and take the land, as he, the defendant, then held it. His theory now is, that he had rendered it impossible for the plaintiff to disaffirm, by taking from him the subject of the conveyance, and putting it out of his power to disaffirm and restore; but still maintains that the plaintiff might ratify, and such ratification would have the effect to cut off all his equities, and deprive him of all the benefits of a ratification. But a court of equity cannot fail to see what the ratification was, and that it was intended by the plaintiff to be one beneficial to himself, and not injurious. That he meant to have it embrace all that his special guardian and the defendant had done in his behalf, and to include all the advantages the law had secured to him during the period of his incapacity to elect.

Equity will thus construe his election, and require him to assume all the additional burdens growing out of the purchase at the foreclosure sale, after the defendant shall have accounted for the benefits he has derived from it.

The judgment of the Special Term is right, and must be affirmed, with costs.

Judgment affirmed.

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JOHN W. SMITH and SOLOMON E. SMITH, Respondents, v.
CAROLINE C. ALLEN, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

The promissory note of a married woman, given for goods which had been purchased by her upon credit, for family use, while her husband is residing and cohabiting with her, and supporting his family, is absolutely void, and has no foundation, either in law, equity, conscience, or good morals, unless there is some special agreement by which the goods are sold to the wife, for her exclusive use, upon the credit of her separate property, and not upon the credit of her husband.

A subsequent promise to pay such note, made by the wife, after the husband's death, is equally void.

And that the vendors, of their own motion, charged the goods on their books to the wife personally, cannot affect her rights.

The case of *Goulding v. Davidson* (26 N. Y., 604), cited, and distinguished.

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COMPLAINT, on a promissory note made by the defendant, during coverture, for the price of merchandise purchased by her, with an allegation that the defendant had, after her husband's death, "in consideration of the moral obligation resting upon her," promised to pay said debt and note. The answer admits a separate estate, alleges coverture, and negatives the usual circumstances under which a married woman's promise to pay can be enforced; and alleges that she gave the note at the request of the plaintiff, J. W. Smith, on his promise that he would never trouble her.

One of the plaintiffs testified that he sold goods, ribbons, towels, muslins, silks, etc., to the defendant, in 1858 and 1859; that plaintiffs charged these goods to her; that, on March 7th, 1861, she settled the account, rejecting some items, for which, she said, her husband was to pay, and giving the note in suit for the balance, and also for an old note of \$78.61, dated March, 1858; that, after her husband's death (May, 1862), the defendant promised to pay the note in suit; that witness considered the defendant's husband responsible, at the time the goods were bought; that defendant and her husband resided and cohabited together at that time; that witness knew both of them, and knew them as husband and wife, up to the time of the husband's death, and did not know at the time the goods were purchased, for whom they were. And on his cross-examination he testified as follows: "When Mrs. Allen bought these articles, do you remember any conversation that took place between you and her? No, sir, I don't. At the time these goods were purchased, was there any agreement between you and Mrs. Allen? I do not recollect any." Plaintiffs read the note in evidence, and rested, and a motion for a nonsuit was denied.

The defendant then, on her own behalf, in addition to testifying that the bill for goods was originally made out in her husband's name; that she had given the note, at the solicitation of Smith, to accommodate him, and on condition that she should never be called on to pay it; and that she had not, since her husband's death, promised to pay it; also testified:

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"This account was for articles used in the family. I never told Mr. Smith or any one else in the store, that I desired these articles charged to me, or that I would become responsible for them, or any of them. I never spoke to them upon the subject."

Some further testimony was given on plaintiffs' behalf, tending to show an implied admission by defendant, that she had promised, since her husband's death, to pay the note. But there was no further evidence showing, or tending to show, that she had originally said, or done anything, expressive of an intent to purchase the goods for herself, or on the credit of her separate estate.

Defendant renewed the motion for a nonsuit, on the grounds, that, there was no proof that the goods were purchased for the benefit of her separate estate, or that they were purchased by her, on the credit of her separate estate; and that there was nothing for the jury to pass upon, the defendant's testimony being substantially uncontradicted.

The court denied the motion, and left it to the jury to say, 1. Whether the defendant had, since her husband's death, promised to pay the debt; 2. Whether "the credit for the account was given solely to the wife," with instructions that "if the account was contracted by her, upon her own credit, and credit was given to her on that," and if "the note was given by her for the purpose of creating an obligation against her to pay the account, then there was sufficient to support the alleged promise" to pay the note. The jury found in favor of plaintiffs for the amount of the note with interest, and the defendant appealed.

Burton & Ten Eyck, for the appellant.

S. Baldwin, for the respondents.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. After a careful examination of the testimony in this case, and of the pleadings, I am

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clearly of the opinion, that the judge at the trial, should, after the close of the testimony, have nonsuited the plaintiffs, or ordered a verdict in the defendant's favor, as requested by her counsel. The note in question was made up of two items, one, and by far the largest portion, was a promissory note, held by the plaintiffs, on which there was due \$78.61; and the balance was the amount of an account composed of various items of merchandise, which appears upon its face to be an account in favor of the plaintiffs against the defendant. Whose promissory note was this which entered into and formed so large a part of the note in question? The defendant alleged that it was a note made by her husband. The plaintiff, John W. Smith, who was the only witness in behalf of the plaintiffs, in regard to the transactions out of which the note sprung, and the consideration thereof, on his cross-examination, by defendant's counsel, was asked, whether this note on which the \$78.61 was due, and which entered into the note in question, was not the note of the defendant's husband, given by him for goods he had purchased. His answer was: "I do not recollect how that is; my impression is, it was her note, but I am not positive of that." The defendant, on the contrary, testified positively and unequivocally, that that note was one which had been given by her husband to the plaintiffs, and was his debt; and that at the time she gave the note in question, it was delivered to her by the plaintiffs, and that she then had it in her possession at her house. So far as this item is concerned, which forms nearly two-thirds of the entire note in question, there is certainly no conflict of evidence. The plaintiff has forgotten how the fact was, and the defendant has not, but testifies positively how it was. Upon the evidence, therefore, so much of the note in question, was indisputably for the debt of the defendant's husband. In regard to the account which formed the smaller portion of the note, the testimony, on the part of the plaintiff, fails entirely to prove that the goods therein named, were purchased by the defendant for herself, or on her own account, or that there was ever any agreement

between the plaintiffs and the defendant, that they should be charged to her. The plaintiff, John W. Smith, expressly testifies that, at the time the goods were purchased, he did not know for whom they were purchased. He also testifies, that, at the time the goods were purchased, he does not recollect any conversation between the plaintiffs and the defendant on the subject, nor any agreement between them. The defendant, upon these questions, testifies positively, that the goods in the account, were purchased for the use of the family, and upon her husband's credit; that she had no portion of them herself, unless perhaps one small item, and that she never bargained for them on her own account or credit, and never authorized the plaintiffs to charge them to her, or consented that they should so charge them. And in reference to this same account, the defendant also testifies, that it had once been made out against her husband, and left at their house by the plaintiffs, and that in the account so rendered, the items were all charged to him. The plaintiff, who testifies, at first denies that the account was so made out and presented, but finally admits that he cannot say it was not so done. But however the fact may be in this particular, it is entirely clear and uncontradicted that the goods were never sold upon her credit, or to her, and there was never any bargain to that effect between the parties. There was no agreement, according to the plaintiffs' own showing, between the parties, that the defendant should purchase the goods on her own account, and pay for them herself, and that they should be charged to her. There was, therefore, nothing to submit to the jury, on the question of a separate purchase by the defendant on her own account and credit. The evidence on that question was all one way. If the plaintiffs charged them in fact to the defendant, they did it, so far as appears from the evidence, of their own motion, which could not affect the defendant's rights. Goods purchased by the wife upon credit for family use, are the goods of the husband, and the husband, and not the wife, is liable to pay for them, unless there is some special agreement between the parties, by which

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they are sold to the wife for her exclusive use, and upon the credit of her separate property, and not upon the credit of the husband. In the latter case it may be that the title would vest in the wife, and she alone would be entitled to use and control the property; but that is not the case here, upon the undisputed evidence. The note, therefore, having been given for the debt of the husband, in his lifetime, and while he was providing for his family, was utterly without consideration, and void. It was a promise to pay demands against another, which she was under no legal, equitable or moral obligation to pay. Neither conscience nor good morals required her to assume these debts, and provide for their payment. Independent, wholly, of the disability of coverture, she was not, and could not have been made liable to the plaintiffs, previous to the giving of the note in question. Unless, therefore, she became legally liable, upon the sole ground of her promise, after the decease of her husband, to pay that note, this action cannot be maintained. The jury have found, upon the evidence, that such a promise was made by the defendant. This finding is against the weight of evidence, as will be seen by looking at the plaintiffs' testimony, and comparing it with that of the defendant. The plaintiff does testify, in general terms, that at some time after the death of her husband, the defendant promised to pay the note; but he is unable to recollect or to state any time or place, or to give any conversation between them on the subject. His testimony is vague and indefinite. On the other hand, the defendant testifies, positively and certainly, that she never made any such promise after her husband's decease; that she had been advised in regard to her rights upon the subject, and at all times refused to have any conversation with the plaintiffs, or either of them, upon the subject of paying the note. But the question, if it was material, was properly submitted to the jury, and the verdict is not, perhaps, so entirely, or so decidedly without evidence to support it as to justify the court in interfering with the judgment on that ground. It must be taken as a fact, therefore, that the

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defendant did promise to pay the note after her husband's death. But I am of the opinion that this promise, under the facts of this case, was not binding upon the defendant, and had no validity in law. The books will, I think, be searched in vain for any case where a promise to pay a demand existing against a husband only, made by his widow after his death, has been held a binding promise. The case of *Goulding v. Davidson* (26 N. Y. R., 604), is relied upon by the plaintiffs' counsel to sustain this promise. But that case, affords to the plaintiffs' claim, in this action, no support whatever. In that case the defendant, who was a married woman, was carrying on business in her own name, and on her own account purchased goods in the line of her business without disclosing the fact of her coverture, the seller being ignorant of such fact. She gave at the time, her promissory note for the amount of the purchase, and used the goods so purchased in her business, and had the exclusive use and benefit of the same. This, it was held, was a sufficient consideration to support her promise to pay the note made, after the death of the husband. The case turned entirely upon the ground that she had made the purchase, in her own name, holding herself out as a *femme sole*, and had used the goods in her separate business, and had the sole and exclusive benefit of the purchase so made. Two of the judges express the opinion, that the title to the goods, under the circumstances of the case, vested in the defendant at the time of the purchase, and not in the husband; and that the latter never became liable to pay for them. There was nothing in that case, but the mere fact of coverture, which prevented the legal liability attaching to her for the consideration of her notes the moment her purchases were completed. Not so here. The defendant was never liable for the consideration, upon which this note is founded. All there is, consists in her promise to pay the debt of her husband, in the form of a promissory note, made while he was living and cohabiting with her, and supporting his family, and her promise to pay such note after his death. The note, when it was given,

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was absolutely void, having no foundation either in law, equity, conscience, or good morals; and the subsequent promise to pay such note, was equally void. (*Littlefield v. Shee*, 2 Barn. & Ad., 811; 22 E. C. L., 187; *Meyer v. Haworth*, 8 A. & E., 467; *Watkins v. Halstead*, 2 Sand. S. C., 311.) None of these cases are overruled or questioned in *Goulding v. Davidson*, *supra*, but are conceded to be good law. The promise to pay the note by the defendant after the death of her husband was wholly immaterial as a fact in the case, in view of the other facts which were undisputed.

The learned justice should, therefore, at the close of the evidence, have nonsuited the plaintiff, or directed the jury to find a verdict in favor of the defendant. The judgment must therefore be reversed, and a new trial ordered with costs to abide event.

Judgment reversed and new trial ordered.

SPERRY OWEN, Appellant, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1899.)

An employee, who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which he has had opportunity to ascertain. *Semble*.

A brakeman, in the employ of a railroad company, while discharging duties in the line of his employment, upon the roof of a freight car, was carried against a highway bridge, and sustained injuries, for which he brought an action against his employer. The bridge was some three and a half feet higher than the top of the highest freight car in use by the company, and had so remained for many years, and since the construction of the railway. The brakeman had entered into the employment of the company with knowledge of the position and height of the bridge, and he had had opportunity of informing himself as to its continuance in the same position.—*Held*, that the plaintiff should have been nonsuited, the danger from the bridge being clearly incident to the labor he undertook to perform.

In view of the brakeman's knowledge as to the bridge, his omission to avoid

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the accident, by stooping, was such want of ordinary care and caution as would have defeated his action, if otherwise maintainable.

Having assumed the risk of injury to his person, from the bridge, evidence offered by him upon the trial, tending to show its dangerous character, was properly excluded.

OWEN sued the railroad company, claiming damages for injuries received while in its employ as brakeman. It appeared that Owen, who had, two years previously, been in the service of the company for several months, as brakeman on freight trains between Rochester and Syracuse, was, in August, 1864, re-employed to act in that capacity between the same points. In September, succeeding his re-employment, while upon the roof of a freight car in a train moving upon his route, he was brought in contact with a road bridge crossing over the track, and sustained the injuries, on account of which the action was brought.

The bridge was shown to be three feet and seven inches above the top of the highest freight car in use by the company, to have been so built originally, and to have remained in such position since the construction of the railway, a period of twenty-five years previous to the accident.

The plaintiff's particular duties were with reference to the brakes of the "coach" attached to the train, and did not call him on the roofs of the cars, but it was his general duty to act under the direction of the conductor; and he testified that he was acting, at the time of the accident, under such direction, that he was engaged in fixing the brakes, that the day was foggy, and the engine, which burned coal, gave forth a good deal of smoke, and he did not observe his approach to the bridge. He also testified, upon cross-examination, that when he entered the company's employment the last time, he knew the position of the bridges on the route mentioned, and was aware that the bridge in question was a low bridge. He offered to prove that twelve years previously to the accident to himself, a brakeman had been killed under like circumstances at the same bridge, and that others had been seriously injured on account of it:

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also the expense and practicability of raising the bridge. The defendant objecting to the evidence as immaterial, it was excluded, and plaintiff excepted. When the plaintiff rested, defendant moved for a nonsuit, which was refused, and defendant excepted. Exceptions were afterward taken by the plaintiff to the judge's charge to the jury, and this appeal was from an order denying the plaintiffs' motion for a new trial upon a case and exceptions.

Quincey Van Voorhies, for the appellant.

S. T. Fairchild, for the respondents.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. If the learned justice, before whom this cause was tried, committed any error in disposing of it at the trial, it was not an error of which the plaintiff can complain. He should, undoubtedly, at the close of the evidence, have nonsuited the plaintiff, or ordered the jury to find a verdict for the defendant, as requested. The risk of injury, by means of the passage of the train of cars under the bridge in question, must be held to have been assumed by the plaintiff, when he entered the defendant's service as a brakeman on the train. He had been in the defendant's employ in the same capacity, and upon the same train, before the present employment for a year or more, at which time he had passed daily under this same bridge, which has been at its present height ever since the road was constructed. The danger was open and obvious, and within the plaintiff's personal knowledge, at the time he entered the defendant's service the last time. It was a danger clearly incident to the service he undertook to perform. He knew, as well as his employer, the perils of the business, at least as respects the bridge in question, and the law will imply that he assumed the risk of personal injury. (*Sherman v. The Rochester and Syracuse R. R. Co.*, 17 N. Y. R., 153, and cases there cited; *Faulkner v. The Erie R. R. Co.*, 49 Barb., 324.) Citations

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might be multiplied to any extent, but it is unnecessary. The decision in the case of *Warner v. The Erie R. R.* (49 id., 558), has been overruled by the Court of Appeals. (S. C. 39 N. Y. R., 468.) The rule is well settled:

But if the rule were otherwise, upon the evidence in this case, the plaintiff was not entitled to recover upon another ground. The injury was caused by his own negligence. He admits that he knew this was a low bridge, and he must have known that he could not pass under it while on the top of the cars without injury, unless he stooped or lowered his person sufficiently to avoid a collision. He might have avoided all injury by the exercise of the most ordinary care and caution. In this view of the case, the objections taken to the charge are of no moment. It answers, also, the exception to the ruling, excluding the evidence offered by the plaintiff, that other persons had been killed at the same crossing. That evidence was wholly immaterial, if the plaintiff took upon himself the risk of injury to his person from that structure, as he undoubtedly did. The order denying a new trial must therefore be affirmed, and judgment ordered upon the verdict.

Order affirmed.

SENECA BURNAP v. JESSE B. LOSEY.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

It was covenanted in a submission to arbitration, executed between two parties, to a sole arbitrator, that they would keep and perform the award, provided it should be made in writing, under his hand, "and ready to be delivered to the said parties in difference, or such of them as shall desire the same," on or before a certain day. After hearing had thereunder, the arbitrator drew up his award, and, on the day preceding that named in the submission, delivered a signed copy to the prevailing party, retaining in his possession his unsigned draft only. On the next day, the other party, knowing of the award and its amount, called on the arbitrator, talked with him about it, made no request for the award, or that a counterpart should be made and delivered to him; but, after the specified

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day, demanded a copy. The arbitrator offered to sign and deliver to him the draft, which was refused.—*Held*, in an action by an assignee of the award, against the unsuccessful party therein, that the right of the latter (the defendant) to insist on formal delivery, had, under the circumstances, been waived, and the award was valid.

That the defendant was bound, by the terms of the submission, to make known to the arbitrator a desire to have the award delivered to him before the time for its making and delivery had expired, and could not defeat it by showing that if he had done so it would not have been ready for him.

When a stamped instrument is shown to have been without stamp at its delivery, and it does not appear that the omission was with intent to defraud the revenue, it will be presumed to have been lawfully stamped. *Per* JOHNSON, J.

THIS was an action upon the award of a sole arbitrator, under a submission executed between two parties. Plaintiff was an assignee of the prevailing party. The submission was in writing, dated February 22d, 1867, covering all matters in controversy between the parties, and contained a mutual covenant to be bound by the award, with a proviso as follows: "Provided, however, that the said award be made in writing, under the hand of the said arbitrator, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the 5th day of March." The defendant claimed a failure of the arbitrator to conform to the condition named, and moved for a nonsuit, upon the grounds that the award was not made and ready to be delivered to the parties by the day named in the submission; and that the award was not stamped until after the whole proceedings were completed. A nonsuit was refused, and a verdict directed for plaintiff, subject to opinion at General Term. The remaining facts are stated in the opinion of the court.

L. B. Proctor, for the plaintiff.

D. W. Noyes, for the defendant.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. The case comes before us on

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a motion for judgment upon a verdict ordered at the circuit, subject to the opinion of the court at General Term. The case, as it is made up, contains a single exception to the ruling of the judge, in admitting evidence against the defendant's objection. This exception, however, the defendant's counsel consents to waive, in order that the case may be heard and determined in this form, upon the merits.

There is no conflict of evidence or dispute as to the facts. The only question is, whether the award, on which the action is brought, is not invalid upon the admitted facts of the case. By the terms of the submission, the award was to be made in writing, under the hand of the arbitrator, "and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the 5th day of March."

The arbitrator heard the proofs and allegations of the parties at the time appointed, and on the 4th of March drew up his award, in writing, and from the original draft made a copy or counterpart, which he signed and delivered to the plaintiff's assignor, who was the successful party, on the morning of that day, retaining the original draft in his possession, without being signed by him.

The award having been thus delivered and published, the defendant, who appears to have heard of it, called, on the afternoon of the same day, upon the arbitrator, and was then informed what the award was, and had a conversation with the arbitrator on the subject; but did not, so far as appears, ask or require that such award, or a counterpart thereof, should be made for him or delivered to him. On the day but one after this, and on the 6th of March, the defendant again called upon the arbitrator, and then demanded a copy of the award. The arbitrator was not then at his house, but a few rods distant. The arbitrator told him he had none for him, but had one for his own use; and if the defendant would go to the house with him, he would give him that. The defendant replied that he did not want it, and asked whether one would have been ready for him if he had called on the 4th or 5th. To this the arbitrator replied, that there would

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not have been any other than the one he then had. On that occasion the defendant informed the arbitrator that he had been, the day before, and taken counsel on the subject, and intimated that he could get rid of the award.

Upon this state of facts, the question is raised, and urged by the defendant's counsel, with much earnestness and apparent confidence, that the award is void, for the reason that the arbitrator did not have, either on the 4th, or 5th of March, a counterpart of his award made out and signed, and ready for delivery to the defendant in case he had called for it. I do not think this position can be maintained. It would be straining the terms and true import of the submission. The arbitrator was not required by the submission to have an award made and signed, and ready for delivery to any party who did not "desire the same." The defendant evidently did not, or he would have asked for it on the 4th, at his interview with the arbitrator, or on the next day, which was the last, for delivering the award to either party desiring the same. His desire was plainly born of the knowledge he acquired afterward, from his counsel, that possibly he might have defeated the award against him altogether had he demanded, or expressed his desire, that the award, or its counterpart should be delivered to him on the 4th, or 5th of March. At all events, his desire did not manifest itself until after this information; and it may be presumed that it increased in fervor, and intensity, from that time. Especially if it should turn out, that no counterpart had been prepared to meet and satisfy his demand, had he made it. This was palpably an after thought, and altogether too late. He had clearly waived his right by not applying in time. What "might have been" is not equal in law to what actually happened. The case of *Perkins v. Wing* (10 Johns., 143), is, I think, decisive of this case. In that case, as in this, the defendant called on the arbitrators for the award within a few days after it was to have been delivered, and had, in fact, been delivered to the successful party, and the court held it was too late; and that by not demanding the written

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award when it was delivered to the successful party, or giving notice that he desired it, he had acquiesced in that mode of publication and delivery, and waived the necessity of a delivery more formal.

The submission in that case was like the one here, requiring the arbitrators to have the award in writing, under their hands, ready to be delivered to the parties in difference, "or any of them requiring the same" on or before a certain day. In *Buck v. Wadsworth* (1 Hill, 321), cited by the defendant's counsel, the award was, by the terms of the submission, to be in writing, "and ready to be delivered to the said parties," by a certain day named, omitting the clause; "or either of them desiring the same." In the latter case, too, the defendant, who was the defeated party, sent his agent for the award on the day named, as he had given notice to the arbitrators he should do. The arbitrators had made none for him, and refused to deliver the one they had made for the successful party, to the agent. The agent examined the award, and returned it to the arbitrators, who had it for delivery, but did not waive the defendant's right to a counterpart. The court held that the award was void, because it was not ready for the parties, according to the terms of the submission, the defendant having demanded it in time, and done nothing to waive his right. This is a different case, both as to the terms of the submission and the subsequent facts.

But again, on the 6th, the day after the time for delivery by the terms of the submission had expired, the defendant only called for a copy of the award, and when he found he could have a copy, or the original, which is the same for this purpose, declined to take it. This shows plainly, that the defendant did not, in fact, then desire the award, but only wished to ascertain, whether one had been made out in due form, so that he might have had it, had he manifested to the arbitrator his desire for it, on the 4th or 5th. But by the very terms and plain meaning and intention of the submission, he was not entitled to the award, or to have one prepared for him even, unless he "desired the same," and

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expressed that desire to the arbitrator, before the time for the making and delivery to him had expired. He could not lie by in silence, until the time had passed, and then defeat the award delivered in due time to the other party, by demanding a copy, or by showing that none had been prepared in due form for delivery, in case he had required it.

No court could decently allow a mere artifice of that kind, to defeat the substantial ends of justice, in a case like this, where the award was, in fact, made in due form and delivered to the successful party, in due time, to the knowledge of the other party.

The other ground urged by the defendant for a nonsuit, at the trial, and which is renewed here, to wit., that the award was not stamped with a United States revenue stamp, when it was delivered to the plaintiff, and is therefore void, is of no force. It had such stamp upon it when produced and proved upon the trial, and there is nothing in the evidence to show that the stamp was omitted at the time of the delivery, with any intent to defraud the revenue laws; it was simply omitted at the time, because the arbitrator had no such stamp at the time, and was not certain that one was necessary. The presumption is, that the plaintiff himself was advised or deemed such stamp necessary, and caused it to be affixed and canceled. If it were necessary, the court might infer, from the evidence, that the arbitrator authorized it to be done, if found to be necessary. The award is not invalid on that ground. (*Vorebeck v. Roe*, 50 Barb., 302.) But this is not insisted upon in the defendant's printed points, and I am inclined to the opinion that no stamp was necessary upon the award. It certainly does not harm the award. It is objected, in the defendant's printed points, that the submission was not stamped when it was executed and delivered. No such objection was raised at the trial, and it cannot be taken now. It had a proper stamp upon it, regularly canceled, at the trial, and was put in evidence without objection. Had the objection been taken at the trial, it might, and probably would have been, shown that the stamp had been

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affixed by the assent of the parties, or otherwise, in a proper and legal manner.

The plaintiff is, therefore, entitled to a judgment on his verdict.

Judgment accordingly.

HULDAH C. ROBINSON v. SARAH D. ROBINSON, individually, and SARAH D. ROBINSON and DAVID COPELAND, Jr., as administrators of WILLIAM H. ROBINSON, deceased, and SAMUEL B. COLEMAN and DANIEL W. CHASE, as executors, &c., of JOHN H. ROBINSON, deceased.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

A testator mortgaged his individual real estate, to secure the payment of the notes of his firm, and died before their payment, having devised the mortgaged property, without express direction in his will for payment of the mortgage.—*Held*, the firm assets were primarily liable to satisfy the mortgage.

And it seems the devisee would (under § 4, 1 R. S., 749) be chargeable with payment of the mortgage to the extent of any deficiency of the firm assets for that purpose.

And such firm assets, which were sufficient to meet the firm liabilities, including the notes, having come into the hands of his executors through the testator, to whom they came as surviving partner—*Held*, the executors were equitable trustees to pay the partnership debts, and distribute the surplus; and the devisee, being plaintiff in an action for the purpose against them and other necessary parties, was entitled to judgment for satisfaction of the mortgage out of the partnership funds.

THIS was a submission to the General Term for adjudication without action under § 372, of the Code.

J. H. Robinson executed and delivered to the defendant, Sarah D. Robinson, as payee of certain notes signed and delivered in the name of the firm of J. H. R. & Son, whereof he was a member, a mortgage upon real estate belonging to him, conditioned for their payment by the mortgagor. J. H. R. survived his son and sole partner in the firm and died, having devised the mortgaged property as follows:

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"After all my lawful debts are paid and discharged, I give, &c." His executors had made payments on the notes. The assets of said firm were more than sufficient to pay all its liabilities.

The controversy related to the rights and liabilities of the property of the firm, that of its deceased members, and of the plaintiff as devisee, with reference to the mortgaged premises, the mortgage and notes, and the payments made and to be made thereon. The parties before the court, were the devisee as plaintiff, the executors of the one and administrators of the other member of the former firm, and the payee and owner of the notes as defendants. The remaining facts are stated in the opinion of the court.

E. Webster, for the plaintiff.

L. G. Angle, for the executors.

G. W. Rawson, for the other defendants.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. The question presented by this case is whether the plaintiff, as devisee of mortgaged premises, shall pay and satisfy the mortgage out of her own funds, or whether it shall be paid out of partnership funds in the hands of the executors of the devisor, who are, with others, interested defendants. The mortgage, as appears upon its face, was executed by the devisor, upon his individual property, to secure the payment of two promissory notes, made and delivered by the firm of J. H. Robinson & Co., of which firm the devisor was a member. The firm consisted of the devisor, J. H. Robinson, and his son, William H. Robinson. The notes were signed in the firm name, and the terms of the promise were, "we promise to pay, &c." Wm. H. Robinson died intestate on the 13th of January, 1867; and the devisor died on the 17th of April, of the same year, leaving his will; by which, after other devises and bequests, the residue of his estate was given to certain residuary lega

tees. The assets of the firm are sufficient to pay and satisfy all the partnership debts. The notes of the firm are the principal debt; and the mortgage given to secure the payment of the notes is but an incident. It is a collateral security, merely, and has no existence as a demand or claim, independent of the principal debt which it was given to secure. (*Merritt v. Bartholick*, 36 N. Y. R., 44.) The notes are the debt of the partnership, upon their face, and by their terms; and the fact that one of the partners gave a mortgage upon his individual property, to secure their payment, raises no presumption that he had assumed the payment of the debt, and made it his own, as between himself and his partner. Being the debt of the partnership, the law devotes the partnership funds to its payment. No individual creditor, or heir, or legatee of either partner, has any right to any portion of the partnership funds, until all debts of such partnership are paid. The interests of such persons are in the residue only, after the satisfaction of partnership debts. (*Kirby v. Carpenter*, 7 Barb., 373; *Ganson v. Lathrop*, 25 id., 455.) The executors of the devisor insist that the plaintiff, as devisee of the mortgaged premises, is bound to satisfy and discharge this mortgage out of her own funds, there being no express direction in the will that it should be otherwise paid. According to the provisions of the Revised Statutes (1 R. S., 740, § 4), this would be so, undoubtedly, if this were the individual debt of the devisor, or if there were no partnership funds applicable to its payment, so that it must necessarily be paid out of the assets in the hands of the executors of the testator, unless paid by the devisee of the mortgaged premises. The general expression in the will, "after all my lawful debts are paid and discharged, I give," etc., is not "an express direction that the mortgage be otherwise paid," such as the statute requires, in order to exempt the devisee from its payment, and charge the executors with the payment thereof, out of the assets of the testator in their hands. (*Rapalye v. Rapalye*, 27 Barb., 610.) But this provision of the statute, it is manifest, does not apply to a case

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like this, where the mortgage is a collateral security only, for the debt of others; and the executors have funds in their hands of the principal debtors which the law devotes to the payment of such principal debt. It only applies, as between devisee, or heirs, and the personal representatives of the estate of the testator or intestate. The partnership funds, in the hands of the executors of the testator, do not belong to the estate, except as trust funds. The testator, as surviving partner, took and held the partnership property as a trustee, in equity, to pay off the partnership debts, and dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner. (*Case v. Abeel*, 1 Paige, 393.) The executors of the testator took the partnership effects upon the same trust. The estate of the testator cannot be benefited by such effects, until after the partnership debts are paid and satisfied, and then only, to the extent of the share in the remainder, which would have belonged to the testator. These executors must, therefore, devote these partnership funds, as the law devotes them, to the payment and satisfaction of partnership debts. They must execute the trust upon which they are held. They cannot be permitted to retain the money in their hands in violation of such trust, and compel the devisee of a surety to pay the debt. They have no right to convert such funds, into the funds of the estate in their hands, until the trusts are all executed, and then only the testator's share of the remainder. Neither the widow and heirs of William H. Robinson, deceased, nor the residuary legatees of the testator, have any equities as respects these partnership funds, against the claims of the plaintiff to have such funds applied to pay the partnership debts for which the land devised to her is charged by way of security. The principal debtor has no equities against his surety, to compel the latter to pay the debt, unless he has placed funds in his hands for that purpose. Here the funds are in the hands of the executors, who stand as trustees, charged with the duty of paying this debt. The land devised is not the fund provided by the partners for the

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payment of this debt; and the devisee is not to be charged with its payment, and driven to seek relief in another action against both estates. The parties are all before the court, and all the interests involved can be determined in this proceeding. The plaintiff is entitled to judgment, requiring and compelling the executors of her devisor to pay the debt which the mortgage in question was given to secure, out of the partnership funds in their hands, and to have the mortgage satisfied and discharged of record.

Judgment accordingly.

THOMAS SHADBOLT, Appellant, v. ELIZA M. BASSETT and LUTHER BOWERMAN, and THOMAS SHADBOLT, 2D, administrators, &c., of SAMUEL SHADBOLT, deceased.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1863.)

S. executed to plaintiff, who was his creditor, a bond and mortgage, to secure an indebtedness, and plaintiff also recovered a judgment against him. S. then conveyed to plaintiff the mortgaged premises, in payment of his indebtedness to him, including that upon the bond and mortgage and judgment.—*Held*, plaintiff was neither a creditor of S., nor a purchaser for a valuable consideration, and not entitled, as such, to question the *bona fides* of a mortgage prior to his own in time and record, given while S. was so indebted to him, and of which he had no actual knowledge, until after the conveyance to him.

And he could not sustain an action for affirmative relief, against a prior mortgage, on the ground of want of consideration for such mortgage.

In an action against B., the mortgagee, and the administrators of S., to set aside a mortgage from S., as without consideration and in fraud of plaintiff, who claimed to be a creditor and subsequent purchaser, B. testified, as a witness for plaintiff, that her mortgage was upon consideration of the surrender of notes given to her by S., for services rendered to him, and also other indebtedness of S. to her. Plaintiff then offered to show, by other witnesses, that the notes were gratuitous; that the services were never rendered, and no relation of employer and employee ever existed between S. and B.; also, that the notes and mortgages were given for an illegal consideration.—*Held*, the evidence was properly excluded, as tending to impeach plaintiff's own witness.

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THIS action was brought to set aside a bond and mortgage for \$1,800, dated June 1st, 1858, and recorded in Monroe county Nov. 20, 1858, made by one Samuel Shadbolt to the defendant, Eliza M. Bassett, as fraudulent and void against the plaintiff, who claimed to be a creditor of the mortgagor, and a subsequent purchaser of the mortgaged premises from him. Shadbolt was deceased, and his administrators had declined to bring the action. The defendant, Bassett, alone appeared and answered. The action was tried by the court without a jury, at an adjourned circuit held at Rochester.

Plaintiff gave in evidence a mortgage for \$3,500, dated November 28, 1858, upon the premises covered by the mortgage of the defendant Bassett, and proved an indebtedness to him, by Shadbolt, prior to the first June, 1858, which it was given to secure. He also proved a judgment for \$666.62 in his favor, against Shadbolt, perfected March 2d, 1861, in Monroe county, and that April 10th, 1861, Shadbolt owed him, including the \$3,500 secured by the mortgage and the judgment, \$6,588.33; and that on that day, Shadbolt conveyed to him, in payment of such indebtedness, the premises covered by the two mortgages; and that plaintiff, at the time of the conveyance, as well as at the time of the delivery of his mortgage to him, had no actual knowledge of the existence of the mortgage to the defendant, Bassett. The conveyance was put in evidence, and contained covenants of warranty, but not against encumbrances.

Plaintiff then gave evidence tending to show the insolvency of Shadbolt at the date of the mortgage from him to Bassett, and that the value of the premises, at that time, was \$3,500, exclusive of the dower right of Shadbolt's wife, and in 1861, \$4,000.

Plaintiff then called the defendant, Bassett, as a witness, and she testified that her mortgage was given in consideration of the surrender of certain notes, which had been executed and delivered to her by Shadbolt, for services rendered to him as a seamstress in his family, and for money loaned to him; and that a further consideration for the mortgage was

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a sum due her from Shadbolt, as the profits of a purchase and sale of real estate, made by him on her account and with her means, the amount having been ascertained sometime before the mortgage was given.

Plaintiff then called Sarah Shadbolt, the widow of Samuel Shadbolt, and offered to prove by her that the notes and mortgage by the defendant, Bassett, were gratuitous, so far as respected the alleged services; that no services whatever were rendered by the said defendant to Shadbolt, and no relation of employer and employee ever existed between them. Also, that the mortgage was given for illicit and adulterous intercourse.

This evidence was objected to on the ground that the plaintiff could not impeach or contradict his own witness, and that the proposed evidence was irrelevant and improper for either purpose. The court sustained the objection and excluded the evidence, and plaintiff excepted.

Plaintiff also offered to prove by George Shadbolt, another witness called by him, that at the time the mortgage was given to the defendant, Bassett, she owed the mortgagor a large debt over and above all demands due her from him. To this the defendant also objected for the same reasons; the court excluded the evidence, and plaintiff excepted.

The court dismissed the complaint, ordered judgment for defendant for costs, and from the judgment entered the plaintiff appealed.

F. L. Durant, for the appellant.

J. Callister and *H. L. Comstock*, for the respondent.

Present—*E. D. SMITH, DWIGHT and JOHNSON, JJ.*

By the Court—*E. DARWIN SMITH, P. J.* The plaintiff is a purchaser of the premises in question, by deed subsequent to the defendant's mortgage, of which he had constructive notice by the registry, although he testifies that he had not actual notice in fact at the time he took his deed.

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The defendant's mortgage was dated June 1st, 1858, and was duly recorded November 20th, 1858, and the plaintiff's deed was given April 10th, 1861.

The plaintiff, not being a creditor to Shadbolt, was not entitled to give evidence tending to show that the defendant's mortgage was made and given with intent to hinder and defraud the creditors of Shadbolt. (*Moseley v. Moseley*, 15 N. Y., 334; *Sanger v. Eastwood*, 19 Wend., 514.) And, not being a purchaser for a valuable consideration, he can only impeach the defendant's mortgage as a subsequent grantee of the premises, standing in the footsteps of his grantor, and upon the same precise ground which would have been available to such grantor if he had not conveyed said premises.

The mortgage being a conveyance, under seal, which imports a consideration, Shadbolt, the plaintiff's grantor, could not be allowed, at common law, to impeach it. (*Parker v. Parmele*, 20 John., 130; *Calkins v. Long*, 22 Barb., 99; *Gilleland v. Failing*, 5 Denio, 312.) According to these last two cases, neither Shadbolt nor the plaintiff, as his grantee, could set up the want of consideration for the mortgage as an affirmative ground of action under the provisions of the Revised Statutes. (2 R. S., 406, §§ 77, 78.) These cases hold that the right given in the statute to impeach a sealed instrument for want of consideration, is limited to a defense or offset, when the action is brought upon the instrument itself.

But, assuming that the plaintiff could sustain his action by proof that the bond and mortgage were wholly voluntary, and given and executed without any consideration, the proof offered by the plaintiff, by the witness, Mrs. Shadbolt, at the trial, was properly overruled. It was not directed to sustain any particular allegation of the complaint, but to contradict the defendant's testimony in respect to the consideration of the mortgage.

A party who is surprised by what a witness, called by him, testifies to on the trial of a cause, may doubtless prove the

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affirmative facts of his action or defense by other witnesses, even though such proof, in effect, contradicts such former witnesses. (1 Greenl. Ev., 442, 443; Cowen & Hill, 533, 780.)

The plaintiff offered to prove that the two notes spoken of by the defendant in her testimony, as constituting part of the consideration of the mortgages, were gratuitous; that no services were rendered by her to Shadbolt, and no relation of an employer and employee existed.

This was directed to contradict the defendant in respect to these notes, first introduced into the case by her testimony; and the offer was also to prove that such notes were given for immoral and illicit intercourse. The evidence simply tended to impeach the defendant.

The other offer, to show that the defendant was, at the time of the mortgage, indebted to Samuel Shadbolt, proved nothing tending to make out a defense. It would have been proper proof to impeach the mortgage, if the plaintiff was suing as a judgment creditor, and the object was to show that the bond and mortgage were made to hinder and defraud the creditors or Shadbolt.

I think no error occurred on the trial, and that the judgment should be affirmed with costs.

Judgment affirmed.

CHARLES I. BALDWIN and FRANCIS B. BALDWIN, Respondents,
v. THE UNITED STATES TELEGRAPH COMPANY, Appellant.

(GENERAL TERM, FOURTH DISTRICT, JULY, 1869.)

Where the operator of a telegraph company contracts to send a telegram over his own line, and the lines of other connecting companies, he becomes the agent of each company assuming to forward the message and they are thereupon severally liable (no partnership relation existing between them), upon the agreement as made by him.

So held, in an action against the last company on the route, for its failure to deliver a message to the proper address.

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In an action against an intermediate company, which has undertaken to forward the dispatch, it will be inferred in the absence of proof, that the charges established by its rules and regulations have been paid as provided in § 11, chap. 265, Laws 1848.

The company, originally receiving the dispatch, and payment for the entire distance, thereby undertakes for its through transmission, and without special agreement limiting its liability, is responsible for a breach occurring at any point on the route. Per JAMES J.

Subject only to such modifications as the peculiar nature of their business renders absolutely necessary, the law regards telegraph companies as common carriers. Id.

The foregoing rules respecting telegraph companies, deduced from rules, applicable to common carriers, and the latter stated and discussed. Id.

A telegraph company can only limit its liability to the sender of a message by express agreement; mere notice of conditions, upon which it will guaranty accuracy, is insufficient. Id.

The damages recoverable, for a breach of contract to send a telegram, are such damages sustained, as the parties had opportunity to know, and should have expected, would be the probable loss entailed by the default.

A party is under no obligation to protect himself against the consequences of a breach of contract until it occurs. Until then, the contract is his protection.

Where, in an action for breach of contract to send a telegram, the defense is negligence of the plaintiff, the onus is on the defendant to allege and prove it.

A defendant cannot avail himself at the trial, of defenses to which demurrers have been interposed and sustained.

THE plaintiffs, residing at Ogdensburgh, N. Y., were in the month of November, 1864, the joint owners of certain interests in oil property near Rouseville, Venango county, Pa., which they desired to sell. A portion of this property was an incomplete oil well, which was about to be tested; but the exact condition and value of which were unknown to the plaintiffs. The plaintiffs, having received an offer of \$3,800 for their interest, from one Thompson, residing in Rochester, N. Y., decided to accept it, unless the plaintiff, Francis B. Baldwin, who was to go to Rochester and close the bargain, should there receive an answer to the telegram, which forms the subject of this action, informing him that the new well was producing so as to make the property worth more. The plaintiffs accordingly went to the office of

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the United States Branch Telegraph Company at Ogdensburgh, and there wrote the following message to their agent, Eric Darling, at Rouseville:

“Dated OGDENSBURGH, *November 16th*, 1864.

“By Telegraph,

“To Eric Darling, Rouseville, Venango county, Pa., at Williams’ boarding house.

“Telegraph me at Rochester, what that well is doing.

“F. B. BALDWIN.”

The message was written upon a piece of paper, on the upper part of which were printed the following words:

“United States Branch Telegraph Company. Forms and conditions on which messages are received by this line for transmission.

“This company will endeavor by good faith and due diligence, to merit the confidence of the public. It will not be responsible for delays, errors and remissness on the part of connecting lines, and only guarantees entire correctness when messages are repeated back to the place from which they are sent, for which repetition a small extra charge will be made.

“JOSEPH OWEN,

“*General Superintendent.*”

This printed matter was separated from the message written below it by a broad black line, and was wholly unconnected with said message. The plaintiffs handed the message to Mr. Hall, the operator in the office of the branch company at Ogdensburgh for transmission to Rouseville, and at the same time told him that they had received an offer of \$3,800 for their property at Rouseville from Thompson of Rochester; that one of their wells was new and they wanted to know what it was doing; that Darling, to whom the message was addressed, was plaintiffs’ agent at Rouseville; that the plaintiff, Francis B. Baldwin, was going to Rochester and would at once accept the offer of Thompson unless the reply to this dispatch informed him the property was worth more; and they wanted to be sure and get the message through to

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prevent Francis B. Baldwin selling at \$3,800, if there was anything new about the property. After making these statements the plaintiff, Charles I. Baldwin, paid the operator, Hall, the full price demanded by him for transmitting the dispatch to Rouseville, and Hall agreed to transmit it carefully for the amount paid, and said "he would be sure and get it through." The line of the United States Branch Company extended only from Ogdensburgh to Syracuse, N. Y., and there connected with the line of the defendant, which made up the remainder of the route to Rouseville, Pa. The message was correctly transmitted by the branch company to Syracuse. The defendant there received it to be transmitted to Rouseville, and did send it from Syracuse correctly in all respects; but the same was understood by defendant's operator at Rouseville to be addressed to E. R. Cooley, and was consequently never delivered to Eric Darling, but was written out by defendant's operator, addressed to E. R. Cooley, and left at Williams' boarding house.

The plaintiff, Francis B. Baldwin, went to Rochester, and, after waiting several days, and calling repeatedly at the telegraph office for an answer to said dispatch, he accepted the offer of Thompson and sold him the plaintiffs' interests for \$3,800. The agent, Eric Darling, was at Rouseville when the message intended for him was received; the new well was tested, and pumping twenty-five barrels; the plaintiffs' interests were worth from five to six thousand dollars, and could have been sold at the time for \$5,000. On the 25th day of November, Eric Darling, supposing the plaintiff, Francis B. Baldwin, to be at Ogdensburgh, sent the following message of his own accord:

"Dated ROUSEVILLE, *November 25th*, 1864.

"By Telegraph.

"F. B. BALDWIN:

"Well flowing eighty (80) bbls. New well pumping twenty-five (25) bbls. Can sell your interest for five thousand (\$5,000) dollars. Telegraph me refusal for ten days. Have Perry transfer to me. ERIC DARLING."

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This message was received at Ogdensburg and immediately forwarded to F. B. Baldwin at Rochester, but did not reach him until after he had sold to Thompson. The cause was tried at St. Lawrence County Circuit, in February, 1868, before the court and jury. The court directed a verdict for the plaintiff for \$1,200 damages. From the judgment entered on such verdict this appeal is taken.

Lowrey, Franziosi & Soren, for the appellants

Foots & James, for the respondents.

Present—JAMES, ROSEKRANS, POTTER and BOCKES, JJ.

By the Court—JAMES, P. J. The facts in this case are undisputed, and only questions of law are presented upon this appeal. The judgment can only be sustained upon the contract made with the operator of the United States Branch Company at Ogdensburg. The defendant was the second company upon the line of communication over which the plaintiff's message was to be transmitted. Hence the important question is fairly presented, how far are intermediate or remote companies, making up the route of transit, liable to senders of messages for their breach of the contract made with the operator at the terminus of the line, who receives pay for the whole distance, and whose agency they recognize by receiving and transmitting or attempting to transmit the dispatch.

The English rule is that a carrier, who knowingly receives a parcel directed to any particular place, undertakes to carry it there, unless he makes known a different purpose; and, in conformity therewith, it has been repeatedly decided in England, that the sender of the parcel has no contract with the second carrier, and cannot recover of him for damages done on his part of the route. (*Coxon v. Great Western Railway Co.*, 5 H. & N., 274.) But the American decisions have wholly overthrown this doctrine, and the prevailing rule in this country is that the carrier receiving the parcel under-

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takes only for his own route, unless he makes known a different purpose. (*Van Santvoord v. St. John*, 6 Hill, 158.) Under this rule, each carrier who undertakes the transmission of the parcel is liable to the sender for his default. But if the carrier who receives the parcel holds himself out as a carrier for the entire distance by receiving pay for the whole route, or by conduct or language which shows such an undertaking, he may then be held liable for losses on any part of the route. (*Weed v. Saratoga and Schenectady Railroad Co.*, 19 Wendell, 534; *De Rutte v. N. Y. & Co. Telegraph Co.*, 30 How. Pr., 403.) From these cases it results that the first company, receiving pay for the whole distance, cannot be considered the agent of the sender to contract with the next company; for if such were the case, it would present the anomaly of an agent liable to his principal for the fault of a third party whom the principal directs the agent to employ. The liability thus cast upon the first carrier does not, however, relieve the carrier actually in fault, but the injured party may, at his option, maintain an action against the carrier receiving the parcel or the carrier committing the breach. If the carrier receiving the parcel and pay for the whole distance expressly limits his liability to his own part of the route, then the only remedy of the plaintiff is against the carrier in fault. The law may be regarded as settled in railway cases, that where a party contracts for transportation over a route composed of several roads, for which he pays an entire sum and receives a through ticket or receipt, the contract is entire and not of several distinct liabilities. If no partnership in fact exist between the roads, he may treat the contract as entire, or several, so far as the other parties are concerned. By the appointment of common agents at the termini of routes who receive the entire consideration and issue through tickets and checks which they recognize and assume, the companies composing the route become bound by the common contract.

In the case of *Hart v. The Rensselaer & Saratoga Railroad Co.* (4 Seld., 37), the plaintiff purchased from an agent,

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at Whitehall, a through passenger ticket to Troy. The defendant's road made up that part of the route from Ballston to Troy. A portion of the plaintiff's baggage was lost by reason of the omission of the baggage master to separate that going to Troy from that intended for Schenectady. The court charged the jury "that it was not a question whether the baggage was received on defendant's road, but by defendant's agents at Whitehall or elsewhere;" upon which the plaintiff obtained a verdict, and the judgment was affirmed by the Court of Appeals. In a manuscript case, decided at General Term in the eighth district (*Morris v. The Michigan Southern Railroad Co.*), the case of *Hart v. The Rensselaer & Saratoga Railroad Co.* was held as conclusively deciding that payment to the common agent of the passage money, for the entire line, accompanied by a through ticket, constituted the several companies of which the line was composed, partners as between themselves and the parties making such payment.

Upon the authority of these cases, the Superior Court of Ohio held the Little Miami Railroad Company liable upon a contract made at the depot of the Washington Branch Railroad Company, in Washington city. The plaintiff bought a through ticket, and had his baggage checked through from Washington to Cincinnati. The defendant was the last company upon the route, and in its possession the plaintiff's baggage was found, broken open and rifled. The plaintiff claimed to recover upon either of two grounds: 1st. That whatever relation the defendant might have sustained to the Washington Branch and intermediate railroads, *inter se*, yet, as to the world, they held themselves out as partners; and the plaintiff had, therefore, a right to charge them as such, and to hold each liable for the acts of either or all. 2d. That, independent of partnership, the trunk being found in possession of defendant, in a mutilated condition, throws upon it the burden of showing that the loss did not happen whilst the trunk was in its possession as carrier. The only facts relied upon as going to show a partnership, were the employ-

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ment of a common agent at Washington to receive through fare ; the receipt of such fare, and delivery of a single ticket and check for the entire route, and the acknowledgment of the sufficiency of such ticket and check by the several agents of all the companies throughout the route, and to the end of the journey. Judge SPENCER, after an able review of the law, says, "I am of opinion that the contract of transportation may be properly considered as *joint* between all the roads participating in its benefits, and that the defendant is liable accordingly ; an opinion," he adds, "in all respects confirmed by Judge REDFIELD, in his *Treatise on Railways*." (*Thornton Check v. Little Miami Railroad Co.*, 7 Am. Law Reg., 427.)

The same view is taken by Professor Parsons, in his learned work on contracts. At page 212, vol. 2, fifth edition, he says : "If carriers for different routes which connect together, associate for the purpose of carrying parcels through the whole line, and share the profits, they are undoubtedly partners, and each is liable *in solido* for the loss or injury of goods which he undertakes to carry, in whatever part of the line it may have happened. If the carriers are not so distinctly associated, but are so far connected that they undertake for the whole line, they should be responsible as before." And at page 214 he says : "The purchase of what is called a through ticket, of an agent authorized by sundry carriers to sell such a ticket, and the price of which is shared in certain proportions by all of them, would estop the carriers from denying a partnership for the whole line, and, at the same time, would perhaps permit the plaintiff, if his person or goods were injured on any part of the route, to sue the carrier on whose route the injury took place, separately."

This well founded rule of the joint liability of connecting carriers, upon the contract made at the terminus of the route, with the common agent who receives pay for the whole distance, applies with equal force and good sense to telegraph as to railroad companies. Judge DALY, in his elaborate opinion in the case of *De Rutte v. N. Y., Albany & Buffalo*

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Tel. Co. (30 How., 403), says: "Where a message is to be transmitted through many connecting lines, it is a matter of convenience to be able to pay the entire charge, either at the place from which it is sent, or at the place where it is received; and it is the interest of companies to make arrangements whereby, upon the payment to them of the whole charge, a message may be sent the entire length of telegraphic communication. *It is to be assumed that this is the case*, when a telegraph company is paid for the transmission of a message to a place beyond its own lines, with which it is in connection by the agency of other companies. For their own benefit, telegraph companies should arrange matters of this kind *inter se*, and should be taken, each to have made the other their agents."

The case of *Leonard & Burton v. N. Y., Albany & Buffalo Tel. Co.*, decided at General Term, in the fifth district, stands upon the same rule, and in many respects, is parallel with this case. The plaintiff's agents sent a message from Chicago, Ill., to Oswego, N. Y., and paid for the whole distance. The route was composed of three separate lines; the defendant's line extended from Buffalo to Syracuse; the message was an order for 5,000 *sacks* of salt; the defendant's operator, at Syracuse, changed the word "*sacks*" to "*casks*," from which error the damages ensued. It was held, that the defendant was liable to the plaintiff for the damages resulting from the error.

The same view of the law, as applicable to telegraph companies, was taken by this court at General Term, when the present case was before us on demurrer. Justice POTTER said, in his opinion, in which all concurred, that "the branch company was the agent of defendant for making contracts over the line of both," and that "the contract, made with the agent, whether it arises from implication of law, or by express special terms, is the contract which may be enforced."

The complaint in this case averred, that the lines of the branch company connected at Syracuse with defendant's line, which extended from Syracuse to Rouseville; and that the

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plaintiff paid the operator at Ogdensburgh for the whole distance. The answer did not deny this connection, but, on the contrary, admitted that Syracuse was the point of junction of the two lines, and that it there received the plaintiff's message from the branch company for transmission to Rouseville; and that it sent the message from Syracuse correctly, but its operator at Rouseville misunderstood the address, and instead of Eric Darling, wrote E. R. Cooley; and that the message, so altered, was left at Williams' boarding house in Rouseville.

These facts show conclusively, that there was a connection between the two companies; that they, together, made up the whole line of communication, for the use of which plaintiffs had paid; that the defendant recognized the authority of the operator at Ogdensburgh to contract in its behalf, and assumed, and attempted to perform the contract made with him, and, within the cases above cited, clearly establish that the defendant is liable to the plaintiffs for its failure to perform that contract.

By § 11, of chapter 265, of the Laws of 1848, it is made the duty of telegraph companies to receive dispatches from, and for other lines; and on payment of their usual charges, as established by the rules and regulations of each company, to transmit the same with impartiality and good faith. At the time this action was tried, there was no defense made, or proof offered, to show that the usual charges of the defendant, for the transmission of this dispatch had not been paid, as established by its rules and regulations. And from the fact, that defendant received the dispatch for transmission, and undertook to transmit it, for the sum demanded and received, the law will infer, in the absence of proof, that its charges were paid, and its regulations complied with. Neither was there any written contract for the transmission of the plaintiff's message, nor was any such defense presented by the answer when this cause was tried; or proved, or offered to be proved, upon the trial. The defendant, in its original answer, had set up as a defense that the printed matter on the paper on which the plaintiff's

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dispatch was written, together with the dispatch, and signature, constituted the contract upon which the branch company undertook to transmit the plaintiff's message, and that the message was not repeated, or requested by plaintiff to be repeated. And as a further defense, that certain printed terms and conditions, upon blanks used by defendant at offices upon its own route, constituted the only contract, upon which the defendant undertook to transmit the message; and that such terms and conditions were not complied with. To each of these defenses the plaintiffs demurred, as not stating facts sufficient to constitute a defence, and this court, at General Term, sustained both demurrers and granted leave to defendant to serve an amended answer. This the defendant refused or neglected to do, and hence these alleged special contracts, terms and conditions limiting the defendant's liability were as effectually out of the case, for all purposes of defence when this action was tried, as if such defence had never been pleaded. The answer must allege all those facts which, when the case of the plaintiff is admitted or proved, the defendant must prove in order to defeat the recovery. The words, *must contain*, are imperative, and the defendant cannot give evidence of any defence of new matter not set up in his answer. (*McKyring v. Bull*, 16 N. Y., 297). And such is the rule, even though such defence appear from the evidence offered by the plaintiff in support of his case. (*Brazill v. Isham*, 12 N. Y., 9.) Hence it cannot avail the defendants that this printed matter is upon the same papers which the plaintiffs produced in evidence to prove the contracts of the several messages. But even if it could, it would be insufficient; for the utmost that this printed matter could require of plaintiffs, was to pay to have the message repeated; and there was no proof introduced to show that the sum which plaintiffs did pay to have this message carefully transmitted, and for which the operator agreed to send it correctly, did not cover the "small extra charge," mentioned in such print; and from the circumstances the court must infer that it did.

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In no event, however, could the printed matter upon this paper be held to limit the liability of the telegraph company. Although telegraph companies are not, strictly speaking, common carriers for the reason that they do not have tangible possession of goods which can be stolen or destroyed, yet from the public nature of their employment, the important matters confided wholly to their care, and the skill and fidelity required in the proper performance of their duties, their legal characteristics become so analogous to those of carriers, that the law must consider them as such, subject only to such modifications as the peculiar nature of their business renders absolutely necessary. In this view, no reason appears why a telegraph company should be permitted to limit its liability in any other manner than a common carrier. The law is well settled, that a carrier cannot limit his liability by notice, even if it be brought to the knowledge of the person dealing with him. (*Dorr v. N. J. Steam Nav. Co.*, 11 N. Y., 485.) There must be an express agreement. This rule applies with equal force to telegraph companies, and is fully recognized in *Breese v. U. S. Tel. Co.* (45 Barb., 274), as applicable thereto. In that case, the court held the printed heading to the paper on which the message was written, under the circumstances, as something more than a mere notice. After stating that a repetition was necessary, to guard against errors or delays, it says: "And it is hereby *agreed* between the signer of this message and this company, that this company shall not be held responsible, &c.," stating the terms of the agreement, and then follows the date and these words: "Send the following message subject to the above conditions and *agreement*." After which the message was written and signed. This, the court held to be a clear and express written contract, and, as such, sufficient to limit the liability of the defendant. But the print upon the paper on which the plaintiff's message was written, in this case, is wholly different. It is totally disconnected from the message, and forms no agreement whatever. It is, at best, a mere notice that the company "only guarantees entire cor-

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rectness when the messages are repeated back to the place from which they are sent, for which a small extra charge will be made." As such notice, it would be wholly insufficient for any purpose, even had it been pleaded as a defence and non-compliance with its terms properly proved.

The contract in this case was simple and clear. The plaintiffs handed the message to the operator at Ogdensburg, and requested him to send it to Rouseville. They told him distinctly the purpose the message was intended to accomplish and the consequences that would follow a failure to transmit it. They paid him the price asked for the correct and careful transmission of the dispatch the entire distance, and he received the money and agreed to send the message to Rouseville carefully. All that was said and done related directly to the message in question, and was fully within the scope of the operator's employment as the representative of the companies making up the route. The defendant, by the confessed negligence or incompetence of its operator, failed to perform the contract, and the result followed which the plaintiffs had foretold. They said that Francis B. Baldwin would accept Thompson's offer of \$3,800, unless the answer to this dispatch informed him at Rochester that the property was worth more. Defendant, therefore, knew that if the dispatch was not delivered, Francis B. Baldwin would get no answer; that if he got no answer he would sell to Thompson for \$3,800, and if he sold to Thompson for \$3,800, and the property was worth more, the plaintiffs would lose the difference.

This brings the case fully within the second branch of the rule of damages laid down in *Hadley v. Baxendale* (9 Exch., 341), viz.: That the party breaking the contract is liable for such damages as, although not at all or not merely the natural or usual result of the breach, were such as the parties had an opportunity to know, and should have expected would be the probable loss entailed by it under the circumstances of the particular case. The rule in *Hadley v. Baxendale* was adopted by the Court of Appeals in *Griffin v. Colver* (16 N.

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Y., 489), and is recognized as the settled rule in this State upon a breach of contract. Judge SELDEN there says, the objection that the damages claimed were not in contemplation when the contract was made, is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to do some act in connection with his own business, not necessarily connected with the agreement. (See, also *Passinger v. Thorburn*, 34 N. Y., 634; *Messmore v. The N. Y. Shot and Lead Co., Ms.*, in Court of Appeals, June Term, 1869.)*

This rule of damages has been adopted by the courts in telegraph cases. In *Landsberger v. Magnetic Tel. Co.*, (32 Barb., 530), it was held, that plaintiff could not recover his damages, because "*on receiving the dispatch for transmission, the defendant had no information, whatever, in relation to it, or the purposes to be accomplished by it, except what could be derived from the dispatch itself.*" While in *Bryant v. Am. Tel. Co.* (1 Daly, 575), it was held, that the damages were recoverable, because, "*from the tenor of the dispatch, and statements, made by the writer to the operator,*" the object of the message was made apparent. This whole subject is elaborately discussed at page 413, of the fourth edition of Sedgwick, on the measure of damages, and the same conclusion adopted. Strong reasons of public policy, and common sense, alike make it necessary, that this should be the rule. Contracts are now frequently made by telegraph; and telegrams often relate to business transactions, of such a character, that great losses would ensue from a failure to transmit, or an error in transmission. The nature of the business is such, that the sender of a message can only deal with the operator, who receives it for transmission, while it is impracticable to explain in the message itself, the result that would follow a failure to deliver it. It is, therefore, both just and necessary, that the sender of a message should be required to disclose to the operator receiving it, the object of the message, and the consequences which will

* Reported 40 N. Y., 422.

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follow a failure to deliver it, before he should be permitted to recover consequential damages; while it is equally just and necessary, that when the sender has performed this duty, and the operator, understanding the purposes of the message, undertakes to transmit it, and receives his full price for doing so, that such damages should be recoverable; for this is the only way in which the sender of the message can bring himself within the rules laid down in the cases cited.

The special damages, sustained by the plaintiffs in this case, were sufficiently averred in the complaint, to enable them to give evidence to show that such damages were in contemplation at the time the contract was made. It was not necessary, that the complaint should contain a statement of this evidence. The rule of pleading special damages laid down in *Squier v. Gould* (14 Wend., 159), so far as it applies to actions for breach of contract, only requires that the particular injury sustained, should be set out in the complaint. The defendant, thus has notice of the claim made against him, and is not taken by surprise.

It does not help the defendant that the plaintiff, Francis B. Baldwin, waited a reasonable time at Rochester for an answer to his dispatch before making the sale to Thompson. It was expressly understood with the operator who received the dispatch for transmission, that Francis B. Baldwin should accept Thompson's offer, unless the answer to that dispatch informed him that the property was worth more. It was, therefore, his duty to give the telegraph company ample time to deliver the message and receive the answer. But there was no obligation upon Baldwin to send a second dispatch, for the proof shows that the only telegraph line at Rouseville belonged to defendant; and, to require a second message, would be to compel the plaintiff to make a second contract with defendant in order to hold him liable on the first. And if a second message had been sent, and a like error committed, the same reasoning would require him to send a third dispatch; beside, the plaintiffs did not know that there was any breach of their contract. No case can

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be found where a plaintiff has failed to recover damages for a breach of contract by omitting to protect himself against a breach before he knew that there was one. It is only when the plaintiff knows that his contract is broken that he is required to protect himself; until then, the contract is his protection. Plaintiffs could not know that defendant had failed to perform the contract for which they had paid. The breach was committed at Rouseville, while one plaintiff was at Rochester and the other was at Ogdensburgh. The only notice that Francis B. Baldwin could have had, was the fact that he received no answer. But this was not sufficient to put him on his guard, for his dispatch called for an answer at Rochester; and hence, had any breach occurred, he had a right to rely upon defendant for information of it, as defendant knew he was waiting at Rochester for information. In the absence of such information, the plainest inference from the failure to receive a reply, was the absence of Darling, or that there was nothing new to communicate. It was plaintiff's duty to attribute it to this obvious cause, rather than assume a breach of defendant's contract. And if Darling was absent, or there was nothing new about the property, a second message would be as fruitless as the first.

But the fact, that the plaintiffs contributed to their own loss, must be affirmatively shown by the defendant. The onus rests upon it. (*Costigan v. M. & H. R. R. Co.*, 2 Denio, 609.) No such defense was made in this case. It had been set up in the original answer, but stricken out on demurrer, and the defendant had omitted to plead anew, although opportunity was given. Hence, it was out of the case when tried, and no evidence was produced on the trial, from which the jury could find that such was the case.

It was objected on the trial, that the plaintiffs should not be permitted to prove Thompson's offer, which was by telegraph, without producing the original dispatch. But it was wholly immaterial whether such an offer was made or not. The proof showed conclusively, that plaintiffs told the operator, when they handed him their dispatch, that they

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had such an offer, and the contract was made in contemplation of it; and that the sale was actually made to Thompson for the price offered. This was sufficient for all purposes of the case. The only rule by which plaintiff's damages could be measured, was the difference between the price offered, and the market value at the time. Of course, the acceptance of an offered price precluded the obtaining of the larger amount, which, had the information been received, the evidence showed to be obtainable. The smallest difference between the sale to Thompson, and the market value of the property, was proved to be \$1,200. There were no disputed questions of fact, therefore, for the jury to pass upon, and the court was correct in directing the verdict for the plaintiffs.

The judgment should be affirmed with costs.

AARON BORDEWELL, Respondent, v. SAMUEL D. COLIE,
Appellant.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

To maintain an action for breach of the implied warranty of title, on a sale and delivery of a chattel, there must have been a retaking of the property by the real owner, but not necessarily eviction by process of law. The vendee may surrender possession to the claimant, and assume the onus of proving the superior title.

If there be no actual dispossession, judicial determination against the vendee, establishing the paramount title of the real owner, with a recovery of the value and payment of the recovery, is tantamount to eviction. Per BARKER, J.

A warranty of title, on sale of personal property, is similar in nature to the covenant for quiet enjoyment in deeds of real estate, and should, by analogy, receive like construction. Id.

It is, it seems, the tendency of courts governed by the rules of the common law, to favor and facilitate remedies on covenants of title, and to moderate the ancient rule, which is, in many cases, severe and unjust to the purchaser.

The vendor of a chattel, who, after his vendee has suffered lawful eviction, voluntarily pays the latter's claim for indemnity, may proceed against his own vendor on the implied warranty of title; and he may also give a cause of action by assignment.

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THIS was an appeal from a judgment for the plaintiff, for \$137.50, upon a trial by the court, at the Erie circuit in November, 1868.

The plaintiff brought the action as assignee, and upon an implied warranty of title, on the sale of a horse. One Richter while owner of the horse, had mortgaged it to one Lodewick, and afterward sold it to the defendant; the defendant sold to one Douglass, who sold to plaintiff, and plaintiff sold to one Smith. All these parties acted in good faith, and without knowledge of the mortgage, except Richter, and at each of the respective sales the vendor was in possession, and his vendee acquired immediate possession from him.

An assignee of the mortgage took the horse thereon, from the possession of Smith; Smith called on the plaintiff for repayment of the purchase money, which plaintiff paid, and then called on Douglass to refund the purchase money paid to him, being the same amount (\$125); Douglass adjusted the matter by assigning to the plaintiff his claim, growing out of the sale by the defendant to him, and was thereupon discharged from liability by the plaintiff.

George Wadsworth, for the appellant.

Corlett & Tabor, for the respondent.

Present—DANIELS, LAMONT and BARKER, JJ.

By the Court—BARKER, J. On the sale of the property by the defendant to Douglass, there was an implied warranty by the vendor, that he had a good title; the effect of which was that the vendee should be free from lawful eviction by other claimants.

In regard to agreements of this character, the rule is general, that if the vendor have no title at the time of the sale and delivery, the vendee can have no substantial relief until he has actually suffered an injury. It is not sufficient that he is menaced by an outstanding title or incumbrance. The covenantee cannot have an action against his vendor until

he has been damnified in consequence of a breach of the implied warranty.

It is then the real question in this case, whether the plaintiff has presented sufficient and competent evidence that the defendant had no title to the horse sold; and if so, has Douglass, the defendant's vendee, been actually damnified by the breach of the agreement?

The warranty is broad enough to protect the buyer against liens and incumbrances on the property, and is wholly executory in its nature. There having been a full and unqualified delivery of the property to the vendee, in this action the burden of proof is on him and those who claim under him.

There must be a recovery by the real owner of the property, before an action can be maintained, and this is in the nature of an eviction.

The first inquiry will be, must the eviction be by process of law; or may the vendee surrender possession to the real owner, and assume the burden of proving the superior title of the claimant to whom he surrenders.

I have arrived at the result, upon an examination of the authorities bearing upon the question, and upon principle, that an eviction by process of law is not necessary.

A warranty of title on sale of personal property is similar, in its nature, to the covenant for quiet enjoyment contained in deeds of real estate, and should by analogy receive like construction. In the latter class of cases, eviction by *process of law* is not necessary, to enable the covenantee to maintain an action for a breach of the covenant. (*Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 Hill, 599.)

It is submitted that there is no adjudicated case in this State, where it is expressly or necessarily held, that the rule is as claimed by the defendant. The case of *Case v. Hall*, (24 Wend., 102), is cited and relied upon, as asserting and maintaining the necessity of an eviction by process of law. Upon a careful examination of the same, it will be seen that no such proposition is attempted to be supported, and the facts of the case did not call for any such holding; as it

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appeared that the vendee was in the full enjoyment of the subject of the sale, and had not been prosecuted by the claimant, and his defense failed.

It will also be observed, that this case was adjudicated, before the courts of this State had distinctly held, that in actions on covenants real, it was only necessary that there should be an actual surrender to the party having the paramount title.

In *Sweetman v. Prince* (26 N. Y., 224), it is clearly and distinctly held by the court, that the purchaser of personal property may voluntarily surrender the same upon the demand of the true owner, and then maintain an action against the seller, taking upon himself the onus of showing the title of the claimant. It may be said that it was not necessary to decide that question in disposing of the case, but it was fully discussed by the court, all the judges concurring.

As between the possessor of personal property, under a sale and delivery to him, and the real owner, there may be recovery of the latter against the former for the value of the property, upon demand and refusal. In such a case, on payment of the recovery, it is held as being tantamount to an eviction, and enables the vendee to maintain an action against his vendor for the damages he has sustained. But, so long as the vendee is in the enjoyment of the thing sold, he cannot maintain an action against his vendor; nor can he, by an amicable arrangement, settle with the claimant, and extinguish the adverse title. He must either submit to an eviction, or there must be a judicial determination in favor of the adverse claimant. (*Case v. Hall*, 24 Wend., 102; *Delaware Bank v. Jarvis*, 20 N. Y., 230.) The proposition that an eviction by process of law is not necessary to enable the buyer to proceed by action against the seller, is supported by authority.

In *Dresser v. Ainsworth* (9 Barb., 620), the action was on a note given by the buyer for the purchase of personal property. At the time of the sale, the property was under a

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levy, by execution, and the property was in the actual possession of the seller, and full and complete possession was acquired by the buyer. Afterward, the sheriff sold the property, taking it from the possession of the vendee. A question was made whether the defendant in the execution was the owner of the property or not, which it is quite unnecessary to state. The defense was a breach of an implied warranty of title, and the court held that the defendant was in a situation to defend the note, remarking: "The burden of proof on the defendant here, was to show that Lyon (the purchaser at the sheriff's sale) had a right to the property, and that was all he had to prove, except that Lyon had taken the property by virtue of such right." The lien by levy is an incumbrance on the property, by means of which the title may be lost to the owner, by a sale afterward to be made. It is very similar to the mortgage lien, in the case before us. At least there was no eviction by process of law, in the sense of that term, as used in this connection. It means the process used after final adjudication, to deliver the possession of the property, the title of which has been in controversy, to the successful party.

In *Rew v. Barber* (3 Cow., 272), the action was upon an implied warranty of title on the sale of a horse. At the time of the sale by the defendant to the plaintiff, the horse was under a levy by execution, against a former owner, who sold to the defendant after the levy, who had no knowledge of the lien. At the time of the sale the horse was in the possession of the vendor, and the vendee acquired complete possession, and the sheriff took the horse from his possession and sold him. In this case, the right of the sheriff to take the property from the possessor was no greater than the right of Stellwagen, the assignee of the mortgage, to take the horse in controversy from Smith. Each proceeded by virtue of his lien. In each case the possessor could have compelled the claimant to resort to an action to secure the possession. I cannot, in principle, discover any difference between the cases last cited and the one now before us. I do not discover

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any reason why the courts are called upon to maintain a different rule in actions based upon a breach of warranty of title on the sale of personal property, than is adopted in a like action in sale of real estate. The law of this State, requiring an eviction in fact before the action can be maintained, is not adopted and followed in Massachusetts in actions on real covenants for quiet possession and warranty of title. In that State the covenantee may buy in an outstanding title and not submit to an eviction, and then maintain an action on his covenants. (*Whitney v. Dinsmore*, 6 Cush., 129; *Estabrook v. Smith*, 6 Gray, 570.) The tendency of all courts, governed by the rules of the common law, is to favor and facilitate remedies, on covenants of title, and to moderate the ancient rule, which, in many cases, is severe and unjust on the purchaser.

There having been an eviction, in fact, as against Smith, it must be treated the same as if it was at Douglass' own hands, the defendant's vendee. If the buyer can submit to an eviction, upon the claim of the real owner, and thereby place himself in proper attitude to pursue his remedies against the seller, no reason occurs to my mind, why, after actual eviction from the possessor, an intermediate vendor may not voluntarily, and without action, pay the just demand for indemnity made by his vendee. This, Douglass did. He satisfied Bordewell, his vendee, by assigning to him his claim against the defendant. The legal effect of the transaction between Bordewell and Douglass is the same, as if Douglass had paid in cash to Bordewell, \$125, in satisfaction of his demand on him, and then Douglass had sold, and assigned his demand against Colie for the same \$125. No hardship can be imposed upon vendors, by adopting the views here expressed, for in no case, can there be a recovery against them, until they are brought into court, and have a fair and complete opportunity to defend their title, in actions where the burden of proof is on those who assail such title. The judgment appealed from should be affirmed with costs.

Judgment affirmed.

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THOMAS TURNER, Respondent, v. HENRY S. JONES, Appellant.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

The law implies a promise of indemnity to an agent, who, believing the directions of his principal to be rightful, executes them; and this, where there is no deceit or misrepresentation by the principal, respecting his right to delegate the authority.

It is, it seems, a general principle of law, to imply a promise, where none is expressly made, and equity and good conscience require one.

APPEAL from judgment of Cattaraugus County Court, affirming the judgment of the Justice's Court.

The defendant was a constable of the town of Randolph, and an execution was issued to him against the property of Thomas Hare, founded upon a valid judgment against Hare, by virtue of which the defendant levied upon a cow, as the property of Hare. The defendant employed the plaintiff to drive the cow to the village of Randolph, agreeing to pay him for such service, fifty cents. The plaintiff drove the cow, and Hare sued him for converting the cow, and recovered her value. The plaintiff notified the defendant of the action against him, and requested him to defend the action. The defendant was a witness on the trial for Turner. Turner drove other cattle at the same time, a calf for himself, and one cow for Warren Dow. The defendant wanted the plaintiff to drive the cow for him, "one that he had an execution on." The plaintiff paid the judgment recovered against him, and brought this action to recover an indemnity. He recovered judgment in the Justice's Court, which, on appeal to the County Court, was affirmed, and thereupon, the defendant appealed to this court.

Jenkins & Goodwill, for the respondent.

Johnson & Crowley, for the appellant.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court—MARVIN, P. J. The point made by the

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defendant's counsel is, that upon the facts, the law will not *imply* a promise of indemnity; that no such promise will be implied, unless the principal by his *conduct*, and *representations*, induced the agent to believe that the act was innocent, while the principal *knew* it was not; that it is the deceit and fraud, upon the agent by the principal, that gives the innocent agent his cause of action for indemnity. They cite *St. John v. St. John's Church* (15 Barb., 346); *Dunlap's Paley on Agency*, 153; and *Howe v. Buffalo, N. Y. & Erie R. R. Co.* (37 N. Y. R., 297). The evidence in this case is very briefly stated, and most of it was by the admissions of the parties on the trial. It was sufficient, I think, to show that the defendant, as a constable, had levied upon the cow by virtue of the execution, and that he claimed to hold the cow by virtue of such execution; that he, in effect, so informed the plaintiff. The plaintiff, as a witness, says defendant wanted I should drive one (the cow) for him; one that he had an execution on. We are to assume that the plaintiff, in accepting the employment, and driving the cow, acted in good faith, believing that the defendant had the right to the possession of the cow, and that this belief was caused by the acts and declarations of the defendant, who claimed the cow. The plaintiff was not conscious that he was a trespasser. I think, in such a case, the law will *imply* a promise of indemnity. There has been, and perhaps there still is, some conflict upon this precise question.

If the agent knows that the act is a trespass, an express promise of indemnity will not give him a remedy over.

Paley, at the place cited, says that although it was not at the time known to be a trespass, yet if it eventually turns out to be so, a promise of indemnity will not be implied. The author, in this proposition, excludes any question of misrepresentation or fraud by the principal by which the agent was innocently drawn into the commission of the act. As to such cases, he states the rule on page 152. To the text on page 153, there is an American note, questioning its soundness, and citing many cases. In one of them (*Adam-*

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son v. *Jarvis*, 4 Bing., 66), BEST., Ch. J., said: "From reason, justice and sound policy, the rule that wrong doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." See the note and the cases cited in it. In *Coventry v. Barton* (17 J. R., 142), SPENCER, Ch. J., after referring to many cases, says: "I have no hesitation in saying that it is a true and just distinction between promises of indemnity, which are and those which are not void; that if the act directed or agreed to be done is known, at the time, to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise." In that case the evidence tended to show an express promise, but the learned judge does not notice any distinction between an express and implied promise. It is a rule that where there is an express promise, the law will not imply one. The parties have chosen to fix the terms of liability. But in the absence of an express promise, I understand it to be a general principle to imply a promise if the facts are such, as in equity and good conscience, to require a promise. Promises are implied in a large portion of the transactions of life. A works for B, at B's request. Nothing being said about pay, the law at once implies a promise to pay, and gives a rule as to the amount of compensation. So A becomes surety for B, and pays the debt; the law implies a promise to indemnify A. What can be more equitable and just than that he, who claims a right to a thing, or to do an act, and employs another to take the thing, or do the act—such person, believing that it was needful thus to serve his employer—should indemnify the person employed, in case it should turn out that his employer could not defend him successfully in an action brought by a third person?

In my opinion, under proper circumstances, the law will imply the promise of indemnity in the class of cases we are considering.

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In *St. John v. St. John's Church* (15 Barb., 346), Justice MASON, with his usual diligence and ability, examines the question of implying a promise of indemnity in cases of trespass, and comes to the conclusion that no promise can be implied. This case was decided in 1851. *Horace v. Buffalo N. Y. & E. R. R. Co.* (38 Barb., 124), was decided in 1862. WELLES, J., delivered the opinion of the court. The promise of indemnity was implied in that case, though the point was made that there is no implied obligation on the part of the principal to indemnify his agent against the consequences of obedience of a lawful command. This case was carried to the Court of Appeals, and is decided in 37 N. Y. R., 297. It is said in the opinion: "There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed." Several authorities are cited. The principle here enunciated embraces the present case. The judgment should be affirmed.

CYNTHIA A. JOHNSON with JOHN JOHNSON, her husband, and
 WILLIAM M. BOWEN, Appellants, v. ARNER HICKS and
 others, Respondents.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

The joining of law and equity jurisdiction, in the same court, has not changed the practice, nor effected a repeal of any of the provisions of the statute, regulating the course of proceedings on appeals from surrogates' decrees, admitting or refusing probate of wills.

In such cases, when an appeal might formerly have been taken from the decision of the circuit judge to the Court of Chancery. (2 R. S., 609, § 100), the review on appeal is still in the nature of a rehearing in equity.

But when the surrogate's decision is reversed upon a question of fact, the Supreme Court, on reversal, should direct an issue to be made up, to try the questions arising upon the application to prove such will, and direct the same to be tried at the circuit. (2 R. S., 68, § 57; 609 § 98.) And until the final determination of such issue, the case proceeds as an action at law, and is to be so considered on a motion for a new trial.

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The award of such an issue to be tried by a jury, is a matter of right. And the Supreme Court in reversing, on the facts, a surrogate's decree admitting or refusing probate of a will, cannot, at its discretion, direct the surrogate to enter a final decree in accordance with the terms of the order of reversal.

The case of *Pilling v. Pilling* (45 Barb., 86), reviewed and disapproved, so far as it conflicts with the foregoing.

On the trial of an issue to determine whether an alleged testator's signature is genuine or simulated, it seems that his declaration made before the date of the alleged will, that he intended to give his property to the legatees therein named; and his declaration made after that date, that he had made such will, are inadmissible as evidence to sustain the genuineness of the signature.

The rule excluding the opinion of experts, whether a signature is genuine or simulated, formed by comparing it with other writings, not in evidence in the cause or admitted to be genuine, stated and applied in this case.

An instrument purporting to be the last will and testament of Mason Hicks, deceased, was presented by the appellants, the devisees, and legatees, therein named, to the acting surrogate of Niagara county for probate. The same was contested by the respondents, the heirs-at-law and next of kin of the deceased.

The surrogate refused to admit the will to probate, on the grounds that the deceased never executed it; that his signature had been forged; and that the signature of A. T. Richardson, one of the witnesses, had also been forged. Richardson was dead at the time the will was offered. Philip Young, the other witness, was produced and examined on the hearing. Evidence was given tending to prove that the testator's signature was genuine, and that the will had been executed in the manner and form required by the statute. And the contestants gave evidence tending to prove that the signatures of the testator and Richardson were both forgeries.

On appeal to the Supreme Court, the decree of the surrogate was reversed on a question of fact, and issues were settled to be tried at a Circuit Court in Niagara county, involving the questions.

1st. Did Mason Hicks in his lifetime subscribe his name to said instrument?

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2d. Did he in the presence of Philip Young and A. T. Richardson, subscribe the same?

3d. Did each of the attesting witnesses sign his name as a witness at the end of said instrument at the request of said Mason Hicks?

The issues were tried at a Circuit Court in Niagara county on the 6th day of December, 1868, and the jury answered each of the questions in the negative.

Upon the trial the appellant took several exceptions to rulings of the court in receiving evidence offered by the respondents, and rejecting evidence offered by the appellants, and also upon a refusal to charge the jury as requested.

A case containing exceptions and purporting to contain all the testimony given on the trial was prepared, and an order entered that the case and exceptions be heard at a General Term in the first instance.

The appellants brought on the hearing and moved for a new trial, as on a bill of exceptions.

S. F. Brown & Farrell, for the appellants.

Hiram Gardner & S. E. Church, for the respondents.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court.—BARKER, J. Before investigating the several exceptions contained in the case, an important question is to be considered and determined, as to the nature and character of the proceedings before the court, and the rules and practice, that are to guide and govern in the disposition of the same.

On the part of the appellant, it is insisted, that the questions presented by the exceptions to the rulings of the court on the trial, shall be regarded the same as if they arose in an action at law.

On the part of the respondents it is claimed, that the proceedings are now before the court, in the nature of a rehearing in equity, and that the court is as free from the strict and

technical rules of the common law, as if it was a motion for a new trial in an equity action, where feigned issues have been awarded and trial had thereon by a jury; that error in receiving evidence is not ground for granting a new trial, if the facts, established by competent testimony, are sufficient to uphold the verdict; nor will the rejection of evidence furnish ground for reversal, provided the court can see that such rejected evidence should not change the result; and that, this court has the power to disregard the finding of the jury, and to order the will to be admitted to probate, if it is satisfied, upon a perusal of the evidence, that the verdict of the jury is erroneous, and the facts proved establish the validity of the will.

In equity actions, where issues of fact have been awarded and tried by a jury, so long as the verdict of the jury stands, the court is bound by the same, and must follow the findings, upon the final hearing, or in any subsequent proceeding therein. If either party to the suit desires to review the proceedings on the trial, he must prepare a case, and exceptions, and bring them to a hearing and decision before the action is heard on the equities reserved. On such review and motion, for a new trial, the equity court may grant or refuse a new trial within its discretion. It may disregard errors that would certainly lead to a new trial, in a common law action, and it may order a new trial without pointing out any error. (*Forrest v. Forrest*, 25 N. Y., 511; *Lansing v. Russell*, 2 Coms., 563.) Prior to the adoption of the 33d rule, it was within the power of the judge, and frequently exercised, on the final hearing, to disregard the finding of the jury, and, on the minutes of the trial, certified to him by the circuit judge, to arrive at a different and adverse result from that of the jury, and make such conclusions the basis of the decree. This power in the equity judge, led to much just complaint, and often to great injustice. Suitors, relying upon the verdict of the jury, sought a final decree based thereon, and guided thereby. For the first time, they were informed, that the conscience of the court, was

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not satisfied with the verdict of the jury, and that the judge, himself, would determine the facts, consider, and balance conflicting evidence, and contradictory circumstances. The practice, as fixed by the standing rules of the court, is in conformity with the practice in the English Equity Courts, and will be steadily adhered to by this court. (1 Barb. Ch. Pr., 446.)

The jurisdiction of this court over the proceedings is acquired by the special provisions of the statute, and it gives to the proceedings after feigned issues are awarded, the character of an action at law, rather than that of a proceeding in equity. The joining of law and equity jurisdiction in the same court, has not changed the practice, nor effected a repeal of any of the provisions of the statute, regulating the course of proceedings on appeal from the decree of a surrogate admitting or refusing probate to a will.

The Revised Statutes provided for an appeal from the determination of the surrogate to the circuit judge, who heard the appeal upon the return of the surrogate, which contained all the evidence taken before him, his rulings on the hearing and the final decree. (2 R. S., pages 66, 67, § 55, marginal pages.)

If it appeared to the circuit judge that the decision of the surrogate was erroneous, he, by an order, reversed such decision; and if such reversal was founded on a question of fact, the order further directed that a feigned issue be made up *to try the questions arising upon the application to prove the will*, and directed the same to be tried at a Circuit Court. The same were to be made up and tried in the same manner as issues awarded by the Court of Chancery. "But a new trial of such issue may be granted by the Supreme Court in the same manner as if it had been formed in a suit originally commenced in such court." The final determination of such issue, in respect to wills of personal property, is conclusive as to the facts therein controverted, and the surrogate is required to follow such determination. (§ 58, 59, *id.*)

If the circuit judge affirmed the decree or reversed the

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same on questions of law only, then an appeal could be taken to the chancellor. (2 R. S., p. 609, § 100.)

To my mind it is obvious that it is intended by these provisions of the statute, to treat the bill of exceptions the same as if made in an action at law. It will be observed that in a case like this, where the circuit judge and the surrogate disagreed on a question of fact, the proceedings never came before the chancellor, on appeal or otherwise; they remained in the Supreme Court, there to be regarded as an action at law. Another reason is apparent why we should regard the proceedings as on the law side of the court, and apply the rules applicable thereto, in granting or refusing a new trial; the statute makes the verdict final and conclusive on the facts controverted. To hold that the rejection of evidence that is pertinent and material to the issue, and that should be weighed and considered by the jury, when offered by the party that has lost the verdict and is defeated in the litigation, is not error, is disregarding the rules of the common law, and places the rights of suitors in the arbitrary hands of the judge presiding at the circuit. In equity cases, where feigned issues are awarded, the application for a new trial is made before the equity judge, where the more technical rules of the common law do not prevail. Here, by a special provision, the application for a new trial is required to be made in the Supreme Court, a tribunal that proceeds according to the course of the common law.

It is suggested that since the Supreme Court has law and equity jurisdiction combined, the above quoted provisions of the statute are not applicable, and that the issue of fact awarded by the statute, and which is directed to be tried by the jury, is no longer a matter of right to suitors, but that the Supreme Court on appeal from the surrogate's decree can reverse the same on the facts, and direct the surrogate to enter a final decree, admitting the will to probate, or rejecting it, in accordance with the determination of the Supreme Court. And that the Supreme Court may or may not, entirely within its discretion, award feigned

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issues; and to this effect is the case of *Pilling v. Pilling*, (45 Barb., 86), where on appeal from an order of the surrogate refusing probate of a will, the Supreme Court reversed the order on a question of fact, and directed the surrogate to admit the will to probate. This is plainly disregarding the provision of the statute, which has not been repealed, and can only be sanctioned upon the idea, that the reorganization of the courts, since the statute, makes the statute inapplicable. By the provisions of the 17th section of the judiciary act of 1847, the appeal is to the Supreme Court, instead of the circuit judge; and where, prior thereto, the appeals were to the chancellor, they are now to the Supreme Court. The ruling in *Pilling v. Pilling* (*supra*) is contrary to the decisions and uniform practice of this district, and we think is not supported by the cases cited. The provisions of the judiciary act give this court jurisdiction in this class of cases. The provisions of the Revised Statutes remain in force and guide the mode of proceeding.

The learned court, in considering the case of *Pilling v. Pilling*, did not consider how, under the provisions of the Revised Statutes, a court of law got jurisdiction of one class of appeals and the Court of Chancery of another.

When the circuit judge and the surrogate disagreed on the facts, these feigned issues were awarded. When the circuit judge and the surrogate agreed on the facts and the law, or disagreed only on the law, from his order an appeal was taken to the chancellor; but in no case, relating to the probate of a will, could an appeal be taken direct to the chancellor. In cases where the chancellor got jurisdiction of the appeal, he could reverse the surrogate and direct the terms of the decree, either admitting or rejecting probate of the will.

I see no difficulty in observing and following all of the provisions of the statute now. If the Supreme Court concur with the surrogate on the facts, and affirm his decree, and an appeal be taken to the Court of Appeals, and that court disagrees with both the Supreme Court and the surrogate on the facts, that court can direct the terms of the decree to be

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entered, as it did in *Coffin v. Coffin* (23 N. Y. 9), cited by the court in *Pilling v. Pilling*. In all the other cases cited by the learned judge, who writes the opinion in that case, it appears that there was an affirmance of the surrogate's order by the circuit judge in the cases before him, and by the Supreme Court in cases arising since 1847.

Unless the statute requires the making up of feigned issues in cases where the court and surrogate disagree upon the facts, then, in my opinion, the proceedings before us on this hearing are unauthorized; for the court has no authority to authorize them by virtue of its general powers and jurisdiction. The appellate court must hear and determine upon the record certified to it, and has no power to make new issues and receive new evidence. Such were the views of the Court of Appeals in *Devin v. Patchin* (26 N. Y., 441).

The case of *Clapp v. Fullerton* (34 N. Y., page 195), cited by the counsel for the respondents, is not in conflict with these views. The Supreme Court had affirmed the decree of the surrogate. The surrogate had, upon the hearing before him, admitted incompetent evidence, in permitting witnesses to express their judgment as to the testator's mental capacity. This error was disregarded by the Supreme Court and by the Court of Appeals as not fatal, it being apparent, upon the whole case, irrespective of the evidence improperly admitted, that the testator was clearly competent, and that the will was properly admitted to probate; and it is also remarked by the court: "On appeals from the decrees of surrogates, the Supreme Court succeeds to the jurisdiction and authority of the old Court of Chancery. The review is in the nature of a rehearing in equity, and the admission of improper evidence on the original hearing furnishes no ground for reversal, if the facts established by legal and competent testimony are plainly sufficient to uphold it." It is very plain that the question before us arises under very different circumstances. Suppose the Court of Appeals, in the case above quoted from, had arrived at the conclusion, that the will should have been denied probate, it possessed the power to order such a decree

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to be entered by the surrogate, or it might simply reverse the decree and order the surrogate to proceed *de novo*. (*Schenck v. Dart*, 22 N. Y., 420.) In the case at bar, suppose we deny a new trial, and an appeal is taken to the Court of Appeals, and that court is of the opinion, that the verdict of the jury is without sufficient evidence to support it, and the evidence established the due and legal execution of the will. Can it order the will to be admitted to probate? Clearly not; it can only order a new trial, for the reason that it is now before the courts in the nature of an action at law, and this will can never, by any proceeding known in our courts, receive probate, unless the verdict of the jury declares in favor of its due and legal execution. Upon the trial, the appellants offered to prove the declarations of Mason Hicks before the time of making the alleged will, that he intended to give his property to the legatees therein named, and that after the date of the will, he declared that he had made such a will, and stated who the witnesses were, and that the will was in the upper town of Lockport. This evidence was objected to and excluded by the court, and the appellants excepted. This is clearly and admittedly hearsay testimony, and was properly rejected unless it falls within some of the exceptions to the general rule of law, that excludes such evidence. Both parties claim under the decree, and by representation, and they take his estate subject to all claims, demands and incumbrances thereon. As between ancestor and heir, deviser and devisee, testator and legatee, donor and donee, the declarations of the former, made in regard to his estate, against his interest, and in limitation or qualification of the same, are evidence against the latter, on the ground that they are privies in estate and identified in interest, and by this rule, it is to be determined whether the evidence should have been received or not. (1 Greenleaf, §§ 189-190.) It was not against his interest to make the declaration, and it certainly in nowise affected his estate favorably or unfavorably. It remained the same, whether he had made the will or not. If he had executed the will

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when he made the alleged declaration, it vested no estate in the devisees and legatees named therein, and was subject to his revocation.

In the cases cited and relied upon by the counsel for the appellants, it will appear that the rulings are based upon this principle: (*Waring v. Warren*, 1 John, 340; *Paige v. Cagwin*, 7 Hill, 361; *Smith v. Webb*, 1 Barb., 231; *Booth v. Swozey*, 4 Selden, 276; *Brown v. Mailler*, 2 Kern., 118; *Keator v. Dimmick*, 46 Barb., 158; *Hunter v. Hunter*, 19 Barb., 634.)

In *Waterman v. Whitney* (11 N. Y., 161), it was held that the declarations of the testator, before or after the execution of the will, cannot be given in evidence to impeach the same, unless it be to show the mental incapacity of the testator, and they will be rejected for the purpose of proving fraud, duress, imposition, or other like cause. If the respondents would be prohibited from proving the declarations of the testator, that he never had made a will, I do not see how the appellants can prove his declarations, that he had.

The statute of this State requires wills to be executed with great solemnity and formality, and in full compliance with its provisions, and the declarations of the testator cannot be given to uphold or destroy their validity unless made at the time of the execution, so as to become part of the *res gestæ*. (*Jackson v. Betts*, 6 Cow., 377.) We are, therefore, of the opinion that the offer was properly excluded.

Isaac B. Luce was called as a witness for the respondents, and testified that he had seen Mason Hicks write many times, and had been Hicks' tenant. Papers were shown the witness, and he said they were the leases he received from Hicks, and that he saw him sign the endorsement. He then testified, that he did not think it was Hicks' signature to the will.

Afterward Albert J. Kendall was called as a witness by the contestants, and it appeared from his examination, that he had great experience in scrutinizing signatures, and detecting forgeries, and was well entitled to be called an

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expert in such matters. He was then shown the Hicks will, and asked the following question: What is your opinion, as to whether the signature of "Mason Hicks" is a simulated signature? The appellant's counsel objected, and the court received the answer, which is: It is my opinion, that "Mason Hicks," is a simulated signature. The signature of Mason Hicks to the lease, and the endorsement thereon, proved by the witness, Isaac B. Luce, were shown this witness, and the following question asked: Do you discover, in any of these signatures any of the painting, or retouching, which appears in the signature of Mason Hicks to the will? Under an objection by the appellants, that the inquiry was incompetent and immaterial, the question was allowed, and the witness answered: "I see no marks of retouching on any of these signatures or endorsements." The witness had previously, in his evidence, fully described to the jury the appearance of Mason Hicks' signature to the will, giving the formation of the letters, the indications existing, that the words had been retouched or painted; that the lines of the letters were broken, and fully and minutely describing the formation and peculiarities of the letters in the signature. The witness had never seen Mason Hicks write, and was not familiar with his signature by other means.

The latter question called for the opinion of the witness, whether the signature of Hicks to the will was genuine or not, by comparison with the signatures attached to the papers exhibited to the witness, Luce. In this State, the opinions of experts are not received to prove the genuineness of the signature in controversy by comparison of hands, unless the signature produced is attached to papers in evidence, and material to the issue, or admitted to be genuine. (1 Greenleaf, §§ 576, 577, 578; *Jackson v. Phillips*, 9 Cow., 94; *Wilson v. Kirkland*, 5 Hill, 182; *People v. Spooner*, 1 Denio, 343; *Dubois v. Baker*, 30 N. Y. R., 355.) The leases were not offered in evidence by the respondents, who produced them to the witness, Luce, and no opportunity afforded the appellants to object to the same; and, if offered

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in evidence,⁴ it is not sure that they would have been pertinent.

The question, in effect, asked for the opinion of the witness. It was placing the signature in controversy in juxtaposition with the one assumed to be given, and not yet exhibited to the jury, and asking the witness if there was a difference in them, and, in addition, suggesting the dissimilarity. The witness answers that there is a difference, that he sees no marks of retouching in any of the signatures or endorsements. Is this anything but an effort to disprove the signature to the will, by a comparison of handwriting? To my mind, it is too plain to need argument or illustration.

The counsel for the respondents cites 30 N. Y., page 355, *Dubois v. Baker*, as an authority for permitting this evidence. There it was admitted that the signature to the note in controversy was genuine, and the claim set up that the body of the note was fraudulently written over the same by the defendant, the holder, and it was admitted that the same was in his handwriting. The witness, a cashier of a bank, and familiar with holder's handwriting, produced five papers, the checks and receipts of the defendant, and he was asked to state in what respect the character of the handwriting of the note in dispute differed from the receipts and notes shown him, for the purpose of showing that the body of the note was not written in the defendant's usual style, but was cramped and unnatural. DAVIES, J., who wrote one of the two opinions published, held that the evidence was competent, and it is apparent that he regarded the papers produced, *as in evidence and material*. MULLIN, J., whose opinion is also published, regarded the papers as in evidence, but held the evidence was improper, on the ground that the witness was not called upon to speak from his own knowledge of the party's handwriting, but from a comparison with other writings. The facts in the case before us do not bring the question within the rule laid down by Judge DAVIES, if we take that to be the proper one.

It is manifest that the answer to the first quesⁿ,
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propounded to the expert, was improperly received. The inquiry clearly and directly called for his opinion on the question in issue. The witness understood the question to call for his opinion, and he gave his answer accordingly: "It is my opinion that 'Mason Hicks' is a simulated signature," the word "simulated" being used in both the question and answer, in the same sense as forged or counterfeited. The fact that this witness afterward gave his reasons for his opinion does not relieve the evidence from the force and ground of the objection. The true basis of the objection is, that the witness had never seen the testator write, nor in any proper manner become familiar with his signature. Until he had this essential knowledge he was not competent to offer an opinion. The evidence of this witness, in describing the appearance of the signature to the will, was competent and undoubtedly very beneficial to the jury, in drawing their attention, in detail, to the appearance of the signature, so as to enable them to judge, whether, as a question of fact, it was different from the testator's genuine signature. The party assailing the will as a forged instrument, had a right to have a full and minute description of the signature incorporated in the record, so that the court of review may be informed as fully as possible of the appearance of the signature. Any intelligent business man is a competent witness for this purpose. However intelligent and experienced, he is incompetent to give an opinion as to the genuineness of the signature, unless he be acquainted with the handwriting of the deceased.

The other authorities cited by the respondent, are decisions made in other States, where it is well understood a different rule prevails. Considering the nature of the issue, upon which this evidence was given, and the character of the evidence, that each party produced to support the same, we must regard this incompetent proof, as likely to have had weight with the jury, in determining the issue against the appellants.

In my opinion, it was technical error to permit the witness,

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Parmelia Burdage, to testify that, in her opinion, on the day the will bears date, Richardson was unable to go up stairs to the room where the will was executed. If it were the only error in the case, the court would likely hold that it could not have had any controlling weight with the jury and disregard the same.

There must be a new trial granted on the feigned issues.

New trial granted.

CHARLES M. RANDALL, Respondent, v. ALMON B. SNYDER,
Appellant.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

Defendant was president of an incorporated company, known as the T. O. and M. Company, and intending and being empowered to bind the company thereby, made a note, running as follows: "I promise to pay, as president of the T. O. and M. Co., &c.," signed his name, adding "President of the T. O. and M. Co.," and for value received delivered it to plaintiff; the plaintiff knew of the defendant's agency, and, that in making the note, he intended to charge only the company.—*Held*, an action, seeking to charge defendant personally on the note, could not be sustained.

Where an agent of a corporation contracts on its behalf, making no representation as to the power of the corporation, he is not personally bound by the contract, if it turns out it was *ultra vires* as to the corporation.

THIS action was brought before a justice of the peace, on a promissory note, made and delivered by the defendant to the plaintiff, in the following terms:

"\$137.75. For value received, I promise to pay, as president of the Transit Oil and Mining Company, one hundred and thirty-seven, and seventy-five one-hundredths dollars, to Charles Randall.

Dated, *November* 16, 1866.

A. B. SNYDER,

President of the Transit Oil and Mining Co.

Judgment was rendered for the plaintiff, and there was a

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etria. on appeal to the Orleans County Court, when it appeared that the note was given upon a consideration, and under circumstances, as follows: The Transit Oil and Mining Company was indebted to one Stoddard, for his services, in a sum equal to the amount of the note; Stoddard owed the plaintiff for services; the latter sold his claim against Stoddard to the company, and the note was given therefor by the defendant, acting in the capacity of president of the company.

It was proved that the defendant was in fact president of the company, and that the plaintiff knew the fact. The evidence tended to show, also, that the company had authorized the transaction, and ratified it afterward. The cause was tried upon the assumption, though there was no formal proof of the fact, that the Transit Oil and Mining Company was a duly organized corporation, under the general laws of this State.

The county judge held, and charged the jury that the note was not the note of the Transit Oil and Mining Company, and that the company was not liable upon it; he also refused to charge, as requested by the defendant, that if the jury should find, that the corporation authorized the defendant to make an arrangement of the claim, and afterward approved the arrangement actually made, with full knowledge thereof, and both parties intended to bind the company only, the plaintiff could not recover.

The court refused, also, to direct a verdict for the defendant, upon the ground, that the transaction was with the company, and that the defendant was not bound by or liable on the note.

Proper exceptions were taken to the charge as made, and to the refusal to charge, as requested.

Defendant moved the County Court, on a bill of exceptions, for a new trial; the motion was denied. A judgment was entered on the verdict, and appeals were taken from the order denying a new trial, and from the judgment.

George Bullard, for the appellant.

John H. White, for the respondent.

Present—MARVIN, LAMONT and BARKER, JJ.

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By the Court—BARKER, J. In considering the question presented by this bill of exceptions, this court must regard the defendant as the duly authorized agent of the Transit Oil and Mining Company, fully empowered to buy the plaintiff's debt against Stoddard, and to make and deliver to him the company's note therefor, and that the plaintiff had, at the time he received the note, knowledge of such agency, and that the defendant did not intend to become personally liable on the note; for the evidence tended to prove all these facts, and the learned county judge, in his charge and refusal to charge, held, as a question of law, that the defendant was personally liable on the note, and that it was not the note of the corporation, although all the foregoing facts were fully and satisfactorily established by the evidence. The court will also regard as proved, that the Transit Oil and Mining Company is a duly organized corporation, under the laws of the State of New York. The jury, by their verdict, have found that the note was unconditionally delivered to the plaintiff at the time mentioned in the proofs.

Then the first and most interesting legal proposition to be investigated is, has the defendant become personally liable to the plaintiff upon this contract. The defendant, in discharging his duty as agent, has, in my opinion, made the instrument the contract of his principal; and it is liable thereon as the party making the same; and the defendant, by the form of the contract and the mode of execution, has clearly and unmistakably indicated his own intention not to become liable thereon.

In respect to the liability of the principal on written contracts, the rule is this; if the name of the principal and a relation of agency be stated in the writing, and the agent really be authorized, the principal is alone bound, unless the language express a clear intention to bind the agent personally; or, in other words, a written contract not under seal is binding on the principal in whatever form made or executed, if the principal's name appear in it, and the intention to bind him be apparent. (*Stanton v. Camp*, 4 Barb., 274; *Bank of Genesee v. Patchin Bank*, 13 N. Y., 309; *Hicks v. Hinde*, 9 Barb.,

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528 ; Story on Agency, § 154 ; 1 American Leading Cases, 579, 602 ; *The New England Marine Insurance Company v. De Wolf*, 8 Pickering, 56 ; *Rathbon v. Budlong*, 15 John, 1 ; *Bradlee v. Boston Glass Manufactory*, 16 Pickering, 347.)

In the last cited case it is said : " As the form of words in which contracts may be made and executed are almost infinitely various, the test question is whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts or the person for whose account his promise is made ; or whether the words referring to a principal are intended to indicate, that he does a ministerial act in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand of another, or the promising and engaging mind of a contracting party."

Testing the liability of the defendant by this clear, distinct, and comprehensive rule, it is plain that he is not liable, and that it is the legal and binding, contract of his principal. He had a principal that could make just such a contract. He was fully empowered to act for the principal. He has in the body of the instrument inserted its full name, and used apt and proper words, to indicate that he was not promising for himself, but was doing a ministerial act for his principal. The written contract on its face, imports what the plaintiff understood to be its legal effect when he received it, as expressed in his own language as a witness on the trial, to wit : " I intended to take the obligation of the company, and I supposed this note was the obligation of the company. I knew there was such a company, and that the defendant was the president of the company. At that time, I did not suppose my claim was against him." In *Bank of Genesee v. Patchin Bank*, *supra*, the liability of the principal, and non-liability of the agent, is affirmed, in a case where the evidence and circumstances are less clear and satisfactory than in this. There the bill of exchange, upon which the Patchin Bank was sued, as endorser, and held liable, was made payable to the order of S. B. Stokes, cashier, and endorsed by him, in his name, with the

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addition only of cashier. The name of the Patchin Bank nowhere appeared on the face of the paper, and of course it could not import on its face, that Stokes was, in making the endorsement, acting as the cashier of the Patchin Bank; but that he, in fact, acted as agent for the bank, duly authorized to make the endorsement, was proved on the trial. The addition of cashier to his own individual name, was quite conclusive that he designed to limit his own liability as endorser, which he might do; the court received it as sufficient evidence, that he endorsed for his principal.

In *Rathbon v. Budlong* (*supra*) the action was upon a note, in the following words:

"Ninety days after date, I promise to pay S. & J. L. Rathbon, or order, three hundred and two, ninety-two one-hundredth dollars, value received, for the Susquehannah Cotton and Woolen Manufacturing Company.

ALBANY, June 24th, 1815.

SAMUEL BUDLONG, *Agent.*"

The agent, Budlong, purchased goods for his principal, and gave the note in payment, and they were simultaneous acts. He was sued, as the maker of the note, and held not to be liable thereon. This case has been regarded as authority in this State, and never questioned, and is decisive of the one before us. I will only cite one more similar case, and that is from a tribunal, whose decisions are ever regarded as high authority by this court. *The New England Marine Insurance Company v. James De Wolf, Jr.* (8 Pickering, 56). The action was on a guaranty, written on the back of a premium note, in these words:

"Boston, April 27th, 1825.

By authority from J. De Wolf, Jr., I hereby guaranty the payment of this note.

ISAAC CLAP."

The principal was held to be liable on this promise, the agent's authority being established. PARKER, C. J., delivered the opinion of the court, and said, "with respect to the form of the guaranty, we are of opinion, that the effect

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of it must be determined by the intention with which it was made. If Clap had authority to make the guaranty for the defendant, and the words are such, as not clearly to bind himself alone, and it can be ascertained that he intended to act for De Wolf, the latter is bound."

Snyder declared that he promised only as the president of the company, whose agent he was, and from all the circumstances of the case, it is evident he acted only in that capacity.

It is not necessary here to refer to the cases cited by the counsel for the plaintiff. Upon examination, they will be found not to contravene any of the propositions above stated and approved.

They are cases chiefly where the agent had no constituent, that he could bind by a promise, or acted in excess of or without authority from the person for whom he assumed to act.

It is needless to remark, in concluding the consideration of this branch of the case, that the court has had in mind, that a different, more technical and unyielding rule applies, where the contract is under seal; for in such cases, to bind the principal, the promise must be in his name, and the agreement executed in his name.

It is urged by the counsel for the plaintiff, that the corporation had no power to buy this account from the plaintiff, and to give its note for the payment of the consideration money. If this be true, as a legal proposition, we cannot see how it will make the defendant liable on this note; for it is not claimed that he represented to the plaintiff, that the transaction of buying the account was within its corporate power.

If the corporation be sued on the note, it may make the question for the plaintiff to meet; but whichever way this be held, it still remains proper for the defendant to set up and rely upon the defence, which he has pleaded, and which the court holds to be sufficient to defeat a recovery.

The judgment appealed from, and the order denying a new trial, are both reversed, and a new trial is granted, with costs to abide the event.

Judgment and order reversed.

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WARREN GRANGER, Appellant v. THOMAS W. OLCOTT and
BRACE MILLARD, Respondents.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

A party purchasing a title to real estate believed by himself and by his grantor to be doubtful, cannot recover back the consideration therefor, by showing that such title was in fact void.

His right to recover would be limited to a case, where the parties believing the title purchased to be good, were laboring under a mistake of the fact.

THE facts are sufficiently stated in the opinion of the court.

J. D. H. Chamberlain, for the appellant.

John Ganson, for the respondents.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court—LAMONT, J. The plaintiff contracted for and obtained a quit claim deed of certain premises from the defendants, for the consideration of \$300, in addition to the amount of certain taxes paid therefor. The premises described in the deed are situated in the city of Buffalo, and were owned by the plaintiff from 1850 to 1856, when he conveyed them to John C. Lord, by warranty deed. All the title or claim of title of the defendants rested upon a deed from the comptroller, dated January 8, 1862, reciting a sale of the premises by him on the 12th day of November, 1859, for taxes before then assessed, and certain proceedings thereafter taken to perfect such title pursuant to statute. The quit claim deed from the defendants to the plaintiff was dated December 27, 1865. The plaintiff employed Mr. Hopkins to buy up the tax title of defendants, and all the negotiations for the sale and purchase were made between Hopkins, the plaintiff's agent, and the defendant, Millard.

The action was tried before Justice BARKER, without a jury, at the Erie circuit, in November, 1868, who reported in favor of the defendants, and judgment was entered accordingly.

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From this judgment the plaintiff appeals. It is a conceded fact in the case that the defendants' tax title was totally void, and the plaintiff claims to recover back the money he paid, on the ground that he supposed it to be valid, and that the defendants were of the same belief; that there was a mutual mistake of the fact, under which the parties acted and were induced to buy and sell this void title or interest in the premises.

The complaint alleges, in this respect, the plaintiff's belief that the defendants had a good and sufficient title in fee simple to the lands in question, under the comptroller's deed, and, likewise, the defendants' belief that their right and title from the same source was absolute.

In the cases cited by the plaintiff's counsel to sustain this action there was a mutual mistake of the fact; a *bona fide* belief by the parties that what was sold existed. (*Gardner v. Mayor of Troy*, 26 Barb., 423; *Martin v. McCormick*, 4 Seld., 331.) So in the case of *Rheel v. Hicks* (25 N. Y. R., 289, 292), they both believed and they were both mistaken.

If the plaintiff and defendants in the present case acted upon the belief which the parties held in the cases cited, that the tax title was valid, then the plaintiff should recover.

The learned justice in this case finds as a fact, that Hopkins, the plaintiff's agent, understood the tax title was defective and advised the plaintiff not to pay for it; and also informed the defendant, Millard, that the defendants' title was defective. The defendants refused to give a warranty deed when solicited to do so by Hopkins.

The defendants told Hopkins that they would only convey such interest as they acquired by virtue of the deed from the comptroller.

Hopkins testifies that he told the plaintiff he did not think they could sustain their tax title.

Millard, the defendant, testifies that Hopkins asked for a warranty deed; that he told Hopkins he would only give a quit claim deed, "I told him," he says, "tax titles were not considered good for much"; he further says, "I did not suppose I

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had a good title ; I supposed I had a good tax title, and said I had as good a title as tax titles ever are." The report states the property to have been worth \$3,000.

Now in *Martin v. McCormick*, above cited in the Court of Appeals, Judge JOHNSON who delivered the opinion of the court says (4 Seld., 334): "The parties did not deal with each other upon the footing of the compromise of a *doubtful* or *doubted* claim, but upon the ground of a *conceded* right in the defendant."

The present case comes nearer to that of *Mowatt v. Wright* (1 Wend., 355), where the plaintiffs paid \$1,000 for the dower right of the defendant in certain real estate formerly owned by defendant's husband in his lifetime, and which had been conveyed away by him, and the father of plaintiffs had also conveyed with covenant of warranty binding the plaintiffs his heirs-at-law.

Mrs. Wright had brought her action for dower in these lands, and it appeared that the attorneys and counsel for the defendants in the dower suit were of opinion that Mrs. Wright had released her dower.

In other words, the parties then paying doubted as to the validity of the interest they were purchasing ; but thought the payment of the \$1,000, was the shortest way of settling the dispute. In that case Mrs. Wright herself thought she had a good and valid right of dower. She had quite forgotten that years before, her husband owned the premises in question, and that she had joined in the conveyance.

But here both parties doubted the title, and a small percentage was paid to quiet the claim.

Both Hopkins, the plaintiff's attorney and agent in the negotiation, and Millard, the defendant, swear to their opinion and belief, that defendant's tax title was not valid ; both had equal means of knowledge, and both were right.

I am of opinion that the plaintiff cannot maintain his action, and that the judgment appealed from should be affirmed with costs.

Judgment affirmed.

GEORGE D. GILSON, Respondent, v. EDWARD MADDEN,
Appellant.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

The original shipper of goods, upon a boat or vessel, for transportation under the ordinary bill of lading, or its equivalent, remains liable to the master for freight money earned, although the latter delivers the consignment without exacting payment for carriage, of the consignee; and this is so, although the consignee offers to pay the freight, which the master refuses to receive.

M. shipped goods to W., the bill of lading contained a marginal memorandum, "Ac. H. & Co."—*Held*, M. must nevertheless be deemed the consignor.

THE facts sufficiently appear in the following opinion:

J. D. H. Chamberlain, for the appellant.

John Ganson, for the respondent.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court—LAMONT, J. This is an appeal from a judgment entered on verdict for the plaintiff, and also from an order at Special Term, denying defendant's motion heard on the judge's minutes, for a new trial.

The action is brought to recover a balance due for freight on a quantity of coal transported on plaintiff's boat, from Buffalo to Rochester *via* the Erie canal. There was a further claim for demurrage, or detention of the boat at Buffalo, but no question arises in the case, except as to the liability of the defendant for the balance due for freight, for which the justice at circuit directed a verdict.

The coal was engaged by the captain of the boat, at Buffalo, of the defendant, loaded there, and carried, and delivered to the consignees in Rochester.

The bill of lading was as follows:

No. —.

BUFFALO, Nov. 14th, 1868.

Shipped in good order, by Edward Madden, on board the boat J. M. Reap, of Pittston, whereof G. D. Gilson is master,

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the following articles, to be delivered in like good order as received, to the place of destination as consigned in the margin, without delay (the dangers of navigation only excepted). In witness whereof, the master of said vessel hath affirmed to two bills of lading of this tenor and date; one of which being accomplished, the other to stand void. (Then followed the quantity of coal, price of freight per ton, Buffalo charges per ton, and the following clauses): "Capt. collect freight and charges; advanced capt. to be deducted from freight, \$94.47. Messrs. Woodward & Son, please hold same, subject to my draft, and pay capt. balance on safe delivery."

(Signed)

E. MADDEN.

The bill of lading was signed by the captain. In the margin was: "Acc., John Hearn & Co." "C. B. Woodward & Son, Rochester, N. Y."

After delivery of the coal to Woodward & Son, the consignees, at Rochester, they offered to pay the balance of the freight. The plaintiff declined to receive it, unless they would also pay his other claim for detention at Buffalo, which they refused to do. They offered a check for the freight, and have been ready and willing ever since to pay that amount.

There is no other proof in the case, as to the ownership of the coal, than what is to be inferred from the bill of lading, and the fact that the defendant had the same in possession at Buffalo, and engaged its transportation, without disclosing any other owner or party interested. The consignee, receiving the cargo under the bill of lading is, as the cases agree, liable to pay the freight by virtue of such receipt; so the assignee or endorsee of the bill of lading becomes his substitute as to such liability, and the consignee becomes exempt therefrom where he does not receive the goods, and they are made deliverable to the consignee or his order. (*Meriam v. Funck*, 4 Denio, 110; *Morse v. Pesant*, 2 Keyes, 16; *Abbott on Shipping*, 285; 3 *Kent Com.*, 221.)

The usual clause in the bill of lading, makes the property deliverable to the consignee or his assigns, *he or they paying the specified freight*. (*Abbott on Shipping*, 214.)

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Such clause in the present bill was wanting, but the direction signed by the shipper, "Capt. collect freight and charges; advanced capt., to be deducted from freight, \$94 1/2. Messrs. Woodward & Son, please hold same, subject to my draft, and pay capt. balance on safe delivery," was legally equivalent to the usual clause above mentioned, and created the same legal liability. (*Hinsdell v. Weed*, 5 Denio, 172; *Davis v. Puttison*, 24 N. Y. R., 317.)

That Woodward & Son were the consignees of the coal, cannot be controverted. Aside from the bill of lading, which makes them so, the complaint alleges the fact and the answer admits it.

The position of the plaintiff's counsel, that Woodward & Son were *agents* by the terms of the bill of lading, and as such not personally liable for the freight money, contradicts a fact admitted by the pleadings, and which, while the pleadings stand, must be taken to be true. (Code, § 168.) But aside from the fact established by the pleadings, the bill of lading itself made Woodward & Son the consignees; they are so named in the bill and margin. Even had the cargo been consigned to their *care*, they would have been such. (*Fitzhugh v. Wiman*, 5 Selden, 559, 560.) Whereas they are here named consignees without any qualification.

Now, although the consignees were clearly liable to pay this balance of freight, the other question arises whether Madden, who shipped the goods, has been relieved from liability, either in the manner of shipment originally, or by the receipt of them by the consignees, who offered and are willing to pay the bill.

Nothing appears in the case to distinguish this transaction from an ordinary shipment of goods, consigned by the bill of lading to a party named.

Madden, the defendant, had the coal on hand; he did not profess to act otherwise than on his own account in freighting the boat.

He was the contractor with the master. Part of the freight he advanced, and made provision for the payment of the balance through a third party, the consignee.

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What were the relations between Madden, the shipper, Woodward & Son, the consignees, and John Hearn & Co., has not been disclosed by the evidence.

The case must stand, I think, on the same footing as the ordinary case of shipment, under the customary bill of lading.

In *Griswold v. The New York Insurance Company* (3 John, 328), Ch. J. KENT says: "The contract of affreightment, like other contracts of letting to hire, binds the shipper personally, and the *lien* which the ship-owner has on the goods conveyed is only an additional security for the freight. This *lien* is not incompatible with the personal responsibility of the shipper, and does not extinguish it." In *Barker v. Havens* (17 John, 234), SPENCER, Ch. J., expressed the opinion "that if it appeared that the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, that the carrier would not be entitled to call on the consignor for freight"; and he adds, with caution: "I should incline to the opinion that, in all cases, the captain ought to endeavor to get the freight of the consignee." In that case, the consignor was held liable for the payment of the freight. The court refer to the case of *Shephard v. De Bernales* (13 East, 568), observing that: "Lord ELLENBOROUGH there examined all the cases, and he considered the clause introduced for the benefit of the carrier of the goods only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods; and that he had a right to waive the benefit of that provision in his favor, and to deliver without first receiving payment, and was not precluded by such delivery, from afterward maintaining an action against the consignor."

In *Davis v. Pattison* (24 N. Y. R., 322), ALLEN, J., says: "The fact, that the law gives an action against an agent, if it does so, when acting and receiving goods *as consignee*, does not discharge the principal. The carrier had his election to retain the property until payment of freight, or, having

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waived this right, and delivered it, to look to the *consignee-agent*, or his principal."

In *Burton v. Strachan* (3 E. D. Smith, 192, note *a*), the action was brought to recover freight of the consignees (named in the bill of lading). They had endorsed the bill of lading to another party, before the arrival of the vessel, and the endorsee had received the goods. The consignees insisted, that their endorsee, receiving the goods under the bill of lading and endorsement, were liable for the freight money, and that they, the consignees, not receiving, were not liable, and so held the court; but the opinion states that the consignors, no doubt, are liable for the freight.

In *Jobbitt v. Goundry* (29 Barb., 511), it is stated, that the neglect of the carrier to collect freight of the consignee, does not affect the liability of the consignor to the carrier for it.

The cases proceed upon the ground, that the original shipper, unless he appears to act as agent for others, is bound by the contract of affreightment as evidenced by the ordinary bill of lading, to pay the freight money. This is the original bargain made, and does not cease to bind the shipper until it is discharged by actual payment, where freight is once earned and becomes due. (Abbott on Shipping, 285; 3 Kent, 222.)

The learned counsel for the defendant insists strenuously that John Hearn & Co., are the consignors by the terms of the bill of lading, and Woodward & Son, the consignees, and that Madden is but the agent of Hearn & Co.; that this all appears on the face of the bill, consequently Madden cannot be made liable as consignor, he appearing only to have acted as the mere agent of Hearn & Co., the real consignors. This is not a correct view of the legal effect of the bill.

The fact that goods are shipped to A for B, or on account of B, proves no more agency on the part of the shipper for B, than the fact that goods are shipped to A, proves an agency on the part of the shipper for A.

It may indicate to whom the goods are to go, on or after arrival, but it cannot be held to mean anything more.

It is rather a direction for the consignees' guidance and

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instruction, than for any other purpose. Now, what difference does it make to the carrier, whether the goods are shipped to be delivered to A or to B, or to A for B, or to one person on account of some other person.

What is the carriers' duty? To deliver the consignment to the party designated to receive it, whether the receiver is to keep it for the original shipper, or to hold it on account of some other party designated by the shipper, does not concern the carrier.

His whole duty is performed by carriage and delivery as per his bill of lading. With much more reason might it be claimed that the shipper is the mere agent of the person to whom the property is ordered to be delivered, the consignee himself; for the legal presumption is, that after the goods are put aboard with such directions, he becomes the owner. (*Fitzhugh v. Wiman*, 5 Selden, 562, per SELDEN, J.; *Davis v. Pattison*, 24 N. Y. R., 320, per ALLEN, J.)

To hold, then, that the party designated to receive the goods at the end of the voyage, whether consignee, or to take from the consignee, is the principal, and the shipper his agent, would be to exempt the shipper from liability, for the freight, in all cases; for every bill of lading necessarily shows such a state of facts, and such a relation of parties.

In the case of *Hinsdell v. Weed* (5 Denio, 172), the flour was shipped by Wilkins, Marsh & Co., of Buffalo. By the bill of lading it appeared, that the flour was consigned to the "care of E. Weed, for John Thomas." At the foot of the bill of lading, there was an order, signed by Wilkins, Marsh & Co., as follows: "On safe delivery of all above flour, E. Weed will please collect of John Thomas freight and charges, and pay eighty-two and forty-four hundredth dollars to O. B. Brackett (the master of boat), or order." Now, according to the argument of the learned counsel for the defendant, John Thomas was the principal in the case cited, and Wilkins, Marsh & Co. his agents; the cases are alike in principle, yet the learned judge, in his opinion (pp. 178, 179), makes Wilkins, Marsh & Co. the consignors, and says they were liable for the freight.

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I cannot entertain a doubt but that Madden, the defendant in this case, was a principal, and not an agent; that he was the consignor and original contractor, with the plaintiff, for the carriage of the goods, and was liable to pay the freight money; that it was optional with the plaintiff to demand the payment of the consignee, or to deliver to the consignee the goods, and call on the shipper for payment.

This was the effect of the charge excepted to.

The order of Special Term, denying a new trial, should be affirmed, and the judgment appealed from should be affirmed, with costs.

Judgment affirmed.

JAMES CAMPBELL v. PHILEMON BURCH.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1899.)

It was shown, in an action to recover possession of personal property, that E., being owner of the property, had given his promissory note to C., and secured its payment by a mortgage thereon, and after the note was over due had procured from C. an assignment to the plaintiff of the mortgage without the note, as security for money thereupon loaned by the latter to E.; that plaintiff re-filed the mortgage, and after the assignment the parties regarded it as security for the plaintiff's loan, and not for C.'s note.—*Held*, the doctrine that a transfer of the incident without the principal is a nullity, was inapplicable.

That the plaintiff proved a *prima facie* title to the property.

That the assignment of the mortgage by the mortgagee, at the request of the mortgagor, was evidence of an agreement between them that the mortgage should no longer continue as a security for the payment of the note.

That the assignment had the effect to transfer C.'s interest as mortgagor in the mortgaged property to the assignee; or, if not, might be treated as the execution of a new mortgage by E. to secure plaintiff's debt, and a valid security in plaintiff's hands against creditors.

This was a motion by the plaintiff for a new trial upon exceptions, ordered to be heard in the first instance at General Term.

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The plaintiff claimed title to certain chattels in defendant's possession, and demanded judgment for possession with damages for wrongful detention. The defendant averred his possession rightfully as owner. Plaintiff had given bonds and re-obtained the property.

At the trial, plaintiff proved a chattel mortgage from one Edward M. Hawkins to Catherine A. Hawkins, covering the disputed property, dated January 4, 1867, conditioned for the payment of a note of \$1,000, from the mortgagor to the mortgagee, due, with interest, on the 1st day of July, 1867, and the filing of the mortgage on the day of its date in the town clerk's office of the town of Clarkson, Monroe county, where the mortgagor then resided.

Also, an assignment of the mortgage to him, by the mortgagee, bearing date November 21, 1867, which described the mortgage but made no mention of the note. Also, a renewal of the mortgage dated December 16, 1867, and re-filed by plaintiff in the same town clerk's office on the day of its date.

The consideration of the note referred to in the mortgage was proved to have been a loan of money and notes, to the full amount thereof, by the mortgagee to the mortgagor, the latter being a step-son of the former.

The circumstances under which the assignment had been made, were proved by the plaintiff's testimony as follows: "He (the mortgagor) was getting out some bolts for me during the previous summer and I let him have money occasionally, and about the close of navigation he was in my debt, and he came down to the city and wanted to get money to get out lumber through the winter, and I told him I understood he was somewhat embarrassed for money, and I couldn't advance any without security, and said I would advance him some if he would give me security; and he said he would give me a chattel mortgage; and I told him I understood his mother had a mortgage, and he said that was so; and I told him I would do it if he would give me an assignment of the mortgage; and it took about three weeks to get the assignment; and finally it came down and I advanced him over \$400 on the 11th December,

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ranced him money from time to time. The amount is ed on the back of the paper. He gave me an assign- and a letter from his mother."

itiff also testified that he had expected to be paid for ances in stave bolts, which he had not received, and e assignment was "a temporary assignment. When I stave bolts I was to re-assign it back to Mrs. Hawkins security to me until I got the stave bolts."

defendant gave no evidence, and the jury, under direc- the court, rendered a verdict in his favor, assessing the at \$500, and plaintiff obtained a stay of proceedings,

. *McConvill*, for the appellant.

. *Fuller* and *E. A. Raymond*, for the respondent.

ent—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

he Court—JAMES C. SMITH, J. The counsel for the nt argues that the nonsuit was right, on the ground law the incident goes with the principal, and a transfer incident, without the principal, is a nullity; and, there- e assignment of the chattel mortgage without the note, plaintiff, was of no effect, and the plaintiff acquired no the mortgaged property.

I conceive, is a misapplication of the rule.

mortgage was assigned to the plaintiff, by Catherine A. as, the mortgagee and holder of the note, at the request ard M. Hawkins, the mortgagor and debtor, upon a nsideration moving from the plaintiff, to wit: A present money by him to Edward M. Hawkins. The mort- as refiled by the plaintiff, and from the time of its ent, was regarded by the parties to it as security for a, and not for the note.

er these circumstances, the plaintiff has a *prima facie* the mortgaged property.

is competent, of course, for the parties to the original ge to agree, that it should no longer continue as a for the payment of the note. The assignment of the

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mortgage by the mortgagee, at the request of the mortgagor. is evidence of such an agreement. The assignment also had the effect to transfer the interest of the mortgagor in the mortgaged property, to the assignee, or if not, it may be treated as the execution of a new mortgage, by Edward M. Hawkins (it having been made by his procurement) to secure the debt of the plaintiff; and the latter having re-filed the mortgage, it is a valid security in his hands as against creditors.

In short, the well settled doctrine, that a transfer of the incident without the principal is a nullity, does not apply to the case, for the reason, that both parties to the note and the mortgage agreed that the mortgage should be separated from the note, and should be thereafter an independent security, or rather a security for another debt.

The other questions in the case require no comment. The nonsuit should be set aside and a new trial ordered, costs to abide event.

Ordered accordingly.

CHARLES J. HAYDEN and WILLIAM C. BUSH, Respondents, v.
CARSO CRANE and SAMUEL E. NORTON, Appellants.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

R, doing business as a retail dealer in furniture, obtained from C a writing addressed to the plaintiff, who was a wholesale dealer in the same line, as follows: "There is a fair prospect that R could sell a few chamber suits, if he had them. If you let him have them, we will see that you receive pay for them as sold, or soon thereafter." In an action to recover the price of articles sold by plaintiff to R, on the faith thereof—*Held*, the guaranty contemplated but a single sale, and that, accompanied or speedily followed by delivery; that it did not intend a continuing order for future delivery of goods from time to time for an indefinite period.

And, it seems, to construe such writing as covering such a continuing order, would give it the effect of a continuing guaranty.

Held, further, that an action upon the guaranty could not be maintained, for miscellaneous articles, constituent parts of "chamber suits," but out of which it did not appear that any such suit, as understood by the parties, could have been made; and although a custom of which R had

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knowledge was shown, for the wholesale trade to sell retail dealers such separate articles, with a view to their arrangement afterward into such units.

The rule of interpretation applicable to contracts of suretyship restated and applied.

The complaint demanded a recovery for furniture sold to Curtis H. Richards, by the plaintiff, Hayden (who had assigned to Crane an interest in the claim), on the credit of the defendant's warranty of payment. The action was referred, and the plaintiff gave, in evidence on the trial, a bill of the articles, as follows:

CURTIS H. RICHARDS, OF PHELPS, N. Y.,

Plaintiff & Norton, Surety.

In account with C. J. HAYDEN, Dr.

866.

| | | | |
|--------|--------------------------------------|---------|----------|
| 2. 27, | To 1 im. oak bedstead | \$10 00 | |
| | 1 " " bureau | 10 00 | |
| | 1 " " glass | 4 00 | |
| | 1 " " sink | 8 00 | |
| | 1 " " round stand | 3 00 | |
| | 1 " " towel rack | 1 00 | |
| | 3 " " chairs | 4 00 | |
| | 1 " " sink washstand | 7 00 | |
| | 3 plain top oak Greckan chairs | 4 50 | |
| | 1 oak round stand | 4 00 | |
| | 1 " towel rack | 1 00 | |
| | 1 " 3-dr. bureau | 9 00 | |
| | 1 " 14 x 24 glass | 7 50 | |
| | 1 walt. sink | 7 00 | |
| | 1 " 3 dr. proj. bureau | 16 00 | |
| | 1 " best dk. " | 16 00 | |
| | 1 " 3 dr. proj. " | 9 50 | |
| | 1 " proj. dk. " | 11 00 | |
| | 12 sett bed castors | 2 25 | |
| | 1 round cor. bedstead | 7 00 | |
| | 1 cane bk. Victoria rocker | 6 00 | |
| 867. | | | \$147 75 |
| 1. 7, | 1 walt. bedstead | \$16 00 | |
| | 1 " " | 16 00 | |
| 868. | | | 32 00 |
| c. 22, | 1 cane bk. walt. nurse | \$3 75 | |
| | 1 " " " " pl. | 3 00 | |
| | | | \$ 75 |
| | Carried forward | | \$186 50 |

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| | | | |
|----------------------|-----------------------------------|----------|----------|
| Brought forward..... | | \$186 50 | |
| 1867. | | | |
| Jan. 17, | 1 walt. com. dk. bureau | \$9 50 | |
| | 1 mhg. " " " | 9 50 | |
| | 1 walt. proj. " " | 11 00 | |
| | | — | 30 00 |
| Feb. 8, | 1 14 x 24 walt. glass..... | \$7 50 | |
| 23, | 1 mhg. proj. bureau | 11 00 | |
| | | — | 18 50 |
| 1867. | | | |
| March 9, | 2 round cor. bedsteads..... | \$14 00 | |
| | 2 com. cottage " | 9 00 | |
| | 2 high head " | 10 00 | |
| | 2 Congress " | 11 00 | |
| | 2 com. washstands | 8 00 | |
| | 2 large " | 8 50 | |
| | 1 carved top walt. nurse | 8 75 | |
| | 1 " " mhg. " | 8 25 | |
| | 1 walt. 3 dr. bureau | 7 00 | |
| | 1 mhg. " " " | 7 00 | |
| | 12 sett bed castors..... | 2 25 | |
| | | — | 78 75 |
| 23, | 1 walt. com. dk. bureau..... | \$9 50 | |
| | 1 mhg. " " " | 9 50 | |
| | | — | 19 00 |
| April 4, | 2 large washstands | \$4 00 | |
| | 2 small " | 3 00 | |
| | 1 cane bk. walt. nurse | 8 75 | |
| | 1 brace arm " " | 4 50 | |
| | | — | 15 25 |
| 20, | 4 com. washstands dk..... | \$6 00 | |
| | 2 " " lt..... | 8 00 | |
| | 1 walt. bureau washstand..... | 7 50 | |
| | 1 mhg. " " | 7 50 | |
| | 2 walt. braced arm rocker..... | 9 00 | |
| | 2 high hd. cottage bedsteads..... | 10 00 | |
| | 2 Congress " " | 11 00 | |
| | 1 round cor. " " | 16 00 | |
| | 1 walt. " " carved..... | 16 00 | |
| | 2 Tucker spring beds..... | 11 00 | |
| | | — | 87 50 |
| June 23, | 1 walt. 12 x 20 glass..... | 5 00 | |
| | | — | \$435 50 |

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The first seven articles on this bill were charged on a bill of particulars rendered to the defendants in the suit, as "1 im. oak chamber suit, \$40."

The facts, as they appeared on the trial, and were found by the referee, are stated in the opinion of the court.

D. Stephenson & Warren T. Worden, for the appellant

J. H. Martindale, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

By the Court—JAMES C. SMITH, J. Appeal from a judgment on the report of a referee. The plaintiffs sued on the following instrument in writing :

PHELPS, *December 19, 1866.*

"MR. C. J. HAYDEN:

"Sir.—There is a fair prospect that Mr. Richards could sell a few chamber suits, if he had them. If you will let him have them, we will see that you receive pay for them as sold, or soon after.

"(Signed)

CRANE & NORTON,

"Bankers and Brokers, Phelps, N. Y."

Richards was a retail dealer in furniture, at Phelps, and Hayden was engaged in the business of manufacturing furniture and selling it at wholesale, at Rochester. Crane & Norton were bankers at Phelps, as the writing imports; and Norton, having been requested by Richards to sign the paper, subscribed the name of his firm thereto, without the knowledge of his partner.

On or about the 20th December, 1866, Richards presented the writing to Hayden, who, upon the faith thereof, as the referee finds, sold furniture to Richards, at different times, to the amount of about \$435, in all. The referee also finds, that of this amount, \$308.75 was ordered by Richards at the time of the presentation of the writing, and was shipped to him, by railroad, at different times, from the 21st of December to and

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including the 9th of March, 1867, according to Richards' directions. The amount delivered or shipped to Richards, at the time of the presentation of the writing, was \$147.75, and this included one chamber suit, at the price of forty dollars.

In order to present fully the views of the referee, it is material to state, that he also finds that, according to the practice or usage among dealers in furniture, country dealers sometimes purchased chamber suits, which were composed of a somewhat indefinite number of pieces of furniture for chamber use, arranged together, but more frequently they purchased chamber furniture, from which suits could be formed, and arranged them into suits, according to their own taste, or to meet the views and taste of their customers; that Richards fully understood this practice and usage, when he presented the writing to Hayden, and that among the furniture ordered by him, at that time, was one chamber suit, arranged as such in Hayden's store; and the residue of the order was for chamber furniture adapted to, and which could be arranged as chamber suits, by said Richards, in conformity to such practice and usage.

It also appeared by evidence uncontradicted, that Richards commenced buying furniture of Hayden, on credit, in the summer of 1862, and continued to do so, from time to time, till June, 1867; that his orders were always filled without objection; that before presenting the writing, he had paid up to within fifty dollars, or thereabouts, which balance he paid on the day when the writing was presented; that he procured and presented the guaranty of his own motion, and not at Hayden's request; that he continued in business till August, 1867, when he sold off all his furniture, being his stock in trade, and removed from the State; and that subsequently to the 20th December, 1867, and from time to time, he purchased furniture of Hayden, exclusive of that sold under the guaranty, and made payments to him, amounting to \$805, which, as the referee finds, Hayden applied, as received, on the debts due from Richards, exclusive of the demand arising from the guaranty.

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It does not appear that Norton had notice that the plaintiff was continuing to ship goods to Richards, on the faith of the guaranty, until after the latter stopped business and left the State.

As to the law of the case, the referee decided that Crane was not bound by the guaranty, and he directed that the complaint be dismissed as to him. He also decided that the instrument was not a continuing guaranty, and that Norton is not liable for distinct purchases made by Richards, subsequently to the presentation of the writing.

But he held that by a fair construction of the writing, Norton became liable for the furniture for the use of chambers, ordered by Richards at the time when he presented the guaranty, and delivered to him as above stated, and on that ground he directed a judgment against Norton for \$308.75, the price of the furniture then ordered, with interest from the 1st September, 1867. To this ruling the defendant's counsel excepted.

The appeal raises two questions, therefore: First, whether Norton's guaranty extends to the several parcels of goods sent to Richards subsequently to the shipment that immediately followed the presentation of the guaranty; and secondly, whether it covers the miscellaneous articles of chamber furniture sold to Richards, which were not in "suits."

It is useful to recur, in the outset, to certain familiar but important rules of interpretation. The extent of the liability of a guarantor, as of every other surety, is to be determined according to his intention as expressed in his contract. In ascertaining his intent, the contract is, in most respects, subject to the same rules of construction and interpretation as every other contract, and among them, to the rule that any ambiguity is to be taken most strongly against the promisor. But this is true only in part. In some respects, the contract of a surety is to be construed strictly in favor of the promisor. His obligation is not to be extended to any other subject, to any other person, or to any other period of time, than is expressed, or necessarily included in it. Mr. Burge, who states

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this latter rule in his commentaries on the law of suretyship, argues in support of it thus: "It was in the power of the person accepting the surety to have expressed, and it is his own fault if he has not expressly included the case to which he seeks to extend the liability of the surety." (Burge on suretyship, p. 40.) In the case of *Russell v. Clark's executors*, Chief Justice MARSHALL said: "The law will subject a man having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume." (7 Cranch, 69; S. C. 2 U. S.: Cond. R., 417, 423.) The rule is also sustained by the following cases, among many others that might be cited: *McClusky v. Cromwell* (1 Kern, 593, op. of ALLEN J., p. 598, and cases cited by him); *Rogers v. Warner* (8 John, 119).

This rule of interpretation, so well established, is applicable to the questions before us, since they relate exclusively to the extent of the subject of the contract. Did the guarantor intend to become liable for an indefinite time, or for any article beyond those specified in his undertaking.

The learned referee recognized the rule, and its applicability to the present case, to the extent of holding that the contract of Norton was not a continuing guaranty, and that it contemplated only a single sale.

But his ruling, that the defendant is liable for the several distinct parcels of furniture delivered to Richards, at different dates after he presented the guaranty, seems to subject the defendant, in a great degree, to the very liability that would have resulted from a continuing guaranty. The ruling assumes that a mere executory agreement for the sale of furniture to be delivered in the future, without any limitation as to the time, was within the meaning of the guaranty. Reading the words of the instrument, even according to their ordinary import,

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and without construing them strictly in favor of the promisor, we cannot consider them as expressing, or clearly implying, that intention. To our apprehension, they indicate an intent on the part of the surety to become liable for a moderate amount of the class of furniture therein specified, to be then presently delivered, and nothing more. What other meaning can be drawn from the allusion to the "prospect," that Richards could sell "a few chamber suits" if he had them on hand, and from the special undertaking of the surety to see that the plaintiff should receive pay for them as "sold." Obviously, the prospect, or opportunity referred to was *then existing*, and it was of such a nature that it would probably be lost by delay. All that was wanting to secure it, was the early possession of the goods, to attain which, Norton was willing to undertake for Richards, trusting to be saved harmless, by the avails of the very sales which Richards would thus be enabled to make. In our opinion, the guaranty contemplated not only a single sale by Hayden, but a sale accompanied, or speedily followed, by delivery. It did not intend a continuing order, for the future delivery of goods, from time to time, for an indefinite period, either at the pleasure of the purchaser, or the convenience of the vendor. It follows, that the defendant is not liable for the distinct parcels of goods delivered, as appears by the evidence, on, and after the seventh of January, 1867.

Is he liable for *all* the articles delivered on the 20th December, 1866, or only for the one chamber suit? He became liable for "chamber suits," in express words. What was meant by the term? All the witnesses agree, that there are such things as chamber suits; but, as the referee has found, they are not always composed of the same number of pieces of furniture, the arrangement of the various articles into suits depending much on the taste of dealers or their customers. In the present case, however, the matter is not left to a test so fluctuating and uncertain. The parties evidently had a definite idea of what constituted a chamber suit, and they have given a practical construction to the term by their acts. In the bill of particulars of the plaintiff's demand. furnished to the defend-

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ant's attorney, in the progress of the suit, the first item stated, is one "oak chamber suit," at forty dollars. The plaintiff testified, at the trial, that the item included a bedstead, bureau, looking-glass, sink, towel-rack, stand and three chairs. The other articles in the bill, were not termed "suits." Norton testified, that he was frequently in Richards' wareroom, after the articles purchased in December were received, and he saw one oak chamber suit, and but one, although he saw other articles of furniture there; and Nelson testified, that Richards had but one chamber suit. This is very satisfactory evidence, that all parties understood the term "chamber suits" alike, and such understanding should control. According to it, only one "suit" was delivered to Richards in December. Although the other articles in the bill were such as are adapted to chamber use, and are used in making up suits, yet it does not appear that they embraced all the various articles needed to make a complete "chamber suit," as understood by the parties, or according to any understanding of that term, known to furniture dealers. Undoubtedly it is not material, that the various articles should have been arranged in suits when delivered; but it is necessary, in order to charge the defendant, that they should have been susceptible of such arrangement. Did Norton become liable for any isolated article, sold to Richards, merely because it could have been used in making up chamber suits? If the purchase had been of a lot of bedsteads, or of looking-glasses, and nothing else, would he have been bound by his guaranty? Effect should be given to the term "chamber suits," by which he limited his undertaking; but those words are rendered unmeaning, if he be held liable for miscellaneous articles of furniture, out of which it does not appear that even one chamber suit could have been made, by any possible arrangement. If, to render a guarantor liable, it is incumbent on those who claim the benefit of the guaranty to show that it has been strictly complied with, the plaintiff's claim for the miscellaneous articles cannot be maintained.

It follows, that the extent of the defendant's liability, is the value of the chamber suit, sold and delivered to Richards, at

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the time when he presented the guaranty; to wit: forty dollars, with interest, from the 1st of September, 1867, the referee having found that Richards sold the property in August of that year.

The judgment should be reversed, and a new trial ordered, cost to abide event, unless the plaintiff will stipulate in ten days to reduce the recovery, to the sum above indicated in which case the judgment should be affirmed for that amount of damages, with liberty to the party, who will then be entitled to costs under the statute, to have his costs taxed and inserted in the judgment.

Ordered accordingly.

PETER BLOSSOM, Appellant, v. GEORGE H. BARRY, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

A judgment entered by a county clerk, on the transcript of a judgment of a Justices' Court, must be docketed in the same manner as the judgments of a court of record. Per J. C. SMITH, J.

Section 63 of the Code, refers to and adopts, in this respect, the existing provisions of the Revised Statutes. Id.

Plaintiff obtained judgment in an action on contract, before a justice of the peace, against H. and C., and filed a transcript with the county clerk, who docketed it under the letter H only.—*Held*, the judgment was a lien upon C.'s real estate, as against him, and as against subsequent purchasers with notice.

C., after such entry of the judgment, sold his real estate, the only property from which the debt could have been made, to M.; and in an action by plaintiff against the county clerk, for neglect to make a proper docket, it failing to appear that M. did not have notice of the judgment when he purchased,—*Held*, the action was not sustained.

Otherwise, it seems, if plaintiff had shown an absolute loss of his judgment through defendant's neglect.

THE facts are stated in the opinion of the court.

H. P. Norton, for the appellant.

Jerome Fuller, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

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By the Court—JAMES C. SMITH, J. Appeal from a judgment of the Monroe County Court reversing a judgment rendered in a Justice's Court in favor of the plaintiff.

In the years 1865 and 1866, the defendant was the clerk of the county of Monroe. On the 18th June, 1865, the plaintiff recovered a judgment before a justice of the peace of the town of Clarkson, in said county, against Ira Haskins and Delos Cheeney, for \$35.92 damages and seventy-five cents costs, in an action on contract, and on the 29th August, 1865, delivered a transcript of said judgment, duly made and certified by the said justice, to the defendant as such clerk, for the purpose of having the transcript filed and the judgment docketed in his office, so as to become a lien on real estate. The transcript was duly filed on the 29th August, 1865, and at the same time the judgment was docketed in the book kept for that purpose under the letter "H," in the usual form, against both defendants, but no entry was made in the docket under letter "C," until sometime between the 18th and 27th days of January, 1866, when the like entries were made under that letter in the same book. On the 29th August, 1865, an execution on said judgment was issued to a deputy sheriff of said county, who could find no personal property with which to satisfy it, and it remained in his hands unsatisfied at the commencement of the suit. At the time of the rendition of the judgment, Cheeney had a tavern stand and about three acres of land at Parma Corners, worth \$5,000, but incumbered to the amount of \$4,700 by several mortgages prior to the judgment, one of which, for \$800, was not recorded. In October, 1865, Cheeney sold and deeded the real estate to Owen McLean for \$5,000, subject to the incumbrances except one of \$400, which was paid out of the purchase money. Neither Cheeney nor Haskins had any other real estate.

It became the duty of the county clerk, on receiving the transcript and his fees, to file the transcript and enter the judgment in the book kept for that purpose in his office. The section of the Code which imposes this duty (§ 63), does not prescribe the form or mode of the entry in the docket. The

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Revised Statutes (2d vol., 361, § 13, sub. 4), provide that "if the judgment be against several persons, such statement shall be repeated under the name of each person against whom the judgment was recovered, in the alphabetical order of their names respectively." This provision, at the time of its adoption, was intended to apply only to judgments recovered in courts of record. At that time, judgments entered by county clerks on justices' transcripts were required to be docketed in a separate book kept for that purpose. (2 R. S., 177, § 128.) But the latter requirement is no longer in force. As the law now stands, such judgments are to be docketed in the same office in which judgments of the courts of record are docketed, and may be docketed in the same book. There is no reason why the same mode should not be employed in both cases, and by fair construction § 63 of the Code may be held to refer to and adopt the mode of docketing prescribed by the Revised Statutes. The clerk attempted to pursue that mode in the present instance, and entered the judgment under the initial letter of one of the defendants, but by inadvertence omitted to enter it under the initial of the other defendant, until after he had conveyed his real estate to McLean.

But although the clerk omitted his duty in that respect, a more serious question is whether the plaintiff was damnified thereby. There was not an entire omission of duty. The transcript was duly filed, and the judgment was docketed so as to create a perfect lien as to Haskins. Unquestionably it was also a valid lien on Cheeney's real estate, as against him. If the lands had been sold on the execution, while he held the title, the sale would have been effectual. The judgment was also valid as against subsequent purchasers with notice. (1 Barb. Ch. R., 571; 3 Cow. 39 and note; 1 Barb. S. C. R., 48; 19 Wend., 90; 4 N. Y., 169.) If McLean knew of the judgment against Cheeney when he purchased, and was not misled by the omission of the clerk to docket it under the initial letter of each defendant, he took title subject to the judgment, and the plaintiff has not been injured. There is no evidence that McLean purchased without notice, or that he

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was so misled, and there is no presumption, in the absence of proof, that his purchase was of that character. Indeed, for aught that appears, he may have assumed the payment of the judgment. It was incumbent on the plaintiff to show that by the defendant's neglect he had absolutely lost his judgment, and in that respect his proof fails. All that he has shown is that McLean had not the constructive notice that would have resulted from a perfect docketing of the judgment.

The judgment of the County Court should be affirmed.

Judgment affirmed.

EZRA W. ACER, Respondent, v. DANIEL P. WESTCOTT, GEORGE B. CURTISS, and DEBBY A. CURTISS, his wife, and CHARLOTTE H. BROWN, executrix of MATTHEW W. BROWN, Appellants.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

A purchaser or mortgagee of lands, is presumed to have knowledge of every fact, to which he is led, by a deed forming a link in the chain of his title.

And he does not, in equity, escape from such presumption, because the fact to which he is referred, is the existence of an equitable right, and not a legal one.

W. took a mortgage from C., on premises to which the latter had title under a deed from B. wherein it was recited that: "This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part, for a conveyance thereof to one * * A, of whom the said party of the second part has become the assignee, or purchaser, and as such, entitled to a fulfillment thereof, by virtue of this conveyance; said contract being dated, &c."—*Held*, W. took his mortgage with presumptive knowledge of A's equitable right to a conveyance from B., and of the terms of the agreement between A. and C., upon which the latter's right to B's conveyance was founded.

And the agreement between A. and C., being for a sale of the premises to which A. had the equitable title under his contract with B., and providing, that on conveyance C. should give a mortgage to B., on said premises, for a balance due from A., and as a next lien thereto, execute a purchase money mortgage to A.; and by means of a subsequent arrangement, for convenience of the parties (but not affecting the agreement between A. and C.,) by which B. was to convey directly to the latter, C. obtained the deed from B., paying her the balance due from A. in money, and before com-

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plying with the terms of his agreement with A., executed the mortgage to W.—*Held*, W.'s mortgage should be postponed to A.'s equity.

W. had loaned to C. the balance paid to B. on A.'s contract, for the purpose of such payment, and it was made part of the consideration of W.'s mortgage.—*Held*, no right to subrogation existed in W., by which his mortgage could be preferred to the extent of such balance over A.'s equity.

APPEAL by defendant, on a case and exceptions from a judgment, on a referee's report.

The action was brought to obtain the delivery from the defendant Curtiss, to plaintiff, of a mortgage for \$3,380.20, upon certain premises, and judgment declaring the same a prior lien to a mortgage upon the same premises, executed by said defendant, to the defendant Westcott. All the defendants answered separately, and on the trial the following facts appeared.

The defendant Charlotte H. Brown, as executrix of Matthew Brown deceased, on the 24th January, 1864, made a contract with the plaintiff for a sale and conveyance to him of certain lots on Magne street, Rochester, for the sum of \$1,200, and plaintiff took possession thereof, as he was authorized to do by the terms of said contract, and put valuable machinery on the property.

On the 24th of April, 1867, the plaintiff entered into a contract with the defendant Curtiss, to sell him the said premises and certain machinery thereon, with another parcel of land, and Curtiss was to pay therefor, as follows: the sum of \$5,000 in real estate which was specified; a mortgage for \$550 to the said executrix, which was to be a first lien on the premises contracted to be conveyed by the plaintiff; and a mortgage for \$3,380.20 to the plaintiff, which was to be a second lien thereon; and to insure the premises for \$3,000, payable to the plaintiff to secure the latter's mortgage. It was provided also in said contract, that the same should remain in force until the deeds of the premises named therein should be delivered, and that the parties should interchangeably take possession of such premises on delivery of the contract; and they accordingly entered into possession as agreed. This contract was executed in duplicate, and each party thereto had a copy.

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Curtiss, desiring to obtain title to a lot on Magne street, belonging to the defendant Brown, as executrix, and adjoining the premises described in her agreement to convey to the plaintiff, he and plaintiff, after the contract between them, went to one Crittenden the agent of said executrix, and made an arrangement with him, with the said owner's approval, by which the deed from her under the contract with plaintiff, was to be made directly to Curtiss, and was to include also the said adjoining lot at the price of \$325 ; and said deed was accordingly made out, dated June 3, 1867, from the executrix to Curtiss, reciting a consideration of \$1,550, and conveying the premises as stated.

This deed was acknowledged by the executrix June 4th, and left with Crittenden, her agent, on the 5th June, and on the last named day, Curtiss called on Crittenden and obtained the deed from him, on payment of \$600, which included the \$550 due on the contract between the grantor and the plaintiff, and the execution of a mortgage to the said grantor for \$281.50, and on the same day the said deed was recorded.

After receiving the deed from the defendant, Brown, and on the same day, and without complying with the terms of his contract with plaintiff, Curtiss executed a mortgage on the property conveyed, and delivered it to the defendant, Westcott, conditioned for the payment of \$6,000 ; the consideration for this mortgage was money and securities to the amount of \$1,750 then advanced by the mortgagor to Curtiss, and \$550, also advanced in money, to be paid by Curtiss to his grantor, as due on plaintiff's contract with her, and so paid, and the balance, an antecedent debt, from the mortgagor to the mortgagee.

It was this mortgage which the plaintiff claimed to have postponed to the lien of the mortgage for \$3,380.20, which he claimed should be executed by the defendant, Curtiss, to him, in pursuance of their contract.

The deed from the defendant, Brown, to Curtiss, contained the following recital, viz.:

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"This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part, for a conveyance thereof to one Ezra W. Acer, of whom the said party of the second part has become the assignee or purchaser, and as such, entitled to a fulfillment thereof, by virtue of this conveyance; said contract being dated January 29, 1864."

The agent, Crittenden, testified that he had not been directed by plaintiff to deliver the deed, and the testimony of the plaintiff and one May was, that plaintiff had requested Crittenden to retain it, until such direction, as he had made large investments in the property, over and above the purchase money. Crittenden also testified that he had given the deed, on the representation to him by Curtiss, that plaintiff had consented thereto. Westcott testified that, on taking the mortgage, a statement or certificate had been obtained from Crittenden, at his (W.'s) suggestion, which was put in evidence, as follows:

"I hereby certify, that on or about the 4th day of April, 1867, Ezra W. Acer, the vendee named in a land contract from Mrs. Charlotte H. Brown, for lots 55, &c., fronting on Magne street, Rochester, authorized the vendor, through me, as her attorney, to convey the same to George G. Curtiss, Esq., assignee of said Acer's interest therein, upon security for a payment of the sum then remaining unpaid on said contract, being \$550, as of April 1st last.

ROCHESTER, *June 4th*, 1867.

DE L. CRITTENDEN,
As Attorney for Charlotte L. Brown.

He also testified that he relied very much on said certificate, did not ask to see the assignment from plaintiff to Curtiss, mentioned in it, and that it did not occur to him there was any written contract to assign, that he supposed it was merely verbal, that he supposed the property was paid for, and did

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not know whether the contract was present or not, that he had heard nothing of it.

George F. Danforth, for the appellant.

W. F. Cogswell, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

By the Court—JAMES C. SMITH, J. The referee decided that by the true construction of the contract between the plaintiff and Curtiss, the latter was bound to give to the former the mortgage provided for in the contract, concurrently with the receiving of the deed of the premises, which mortgage should be the next lien to the mortgage to Mrs. Brown. He also decided, that by the recitals in the deed from Mrs. Brown to Curtiss, the defendant, Westcott, is chargeable with notice of the equitable rights of the plaintiff to such mortgage. The correctness of these rulings is not questioned, so far as they relate to the construction of the contract between Acer and Curtiss, but the appellant's counsel contends that the referee erred in holding that Westcott is chargeable with notice of Acer's equitable rights.

There is no evidence that Westcott had actual notice, and the inquiry is therefore confined to the point, whether, upon the facts found, he is chargeable with constructive notice, that Acer was equitably entitled to a mortgage on the premises, the lien of which should be superior to his own.

In the first place, it is clear that Westcott, as the incumbrancer of Curtiss' title to the premises, is chargeable with notice of the contents of the deed from Mrs. Brown, by which Curtiss acquired such title. This results, from the familiar and well established rule, that a purchaser (and the term includes an incumbrancer) is presumed to have looked to every part of the title, which is essential to its validity. (*Brush v. Ware*, 15 Pet., 93, 111; *West v. Reid*, 2 Hare, 249, 260, 261; *Jumel v. Jumel*, 7 Paige, 591; *Briggs v. Palmer*, 20 Barb., 392; S. C. on appeal, 20 N. Y., 15, and 21 id., 574.)

Indeed, this position is not controverted by the defendant's counsel, so far as it relates to the deed from Mrs. Brown,

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by which Curtiss acquired the legal title to the property. That it is equally applicable, in a court of equity, to the assignment from Acer to Curtiss of the equitable title, seems apparent from the following considerations.

By the rule above stated, Westcott is chargeable with notice, not only of the deed from Mrs. Brown to Curtiss, but also of its contents, so far as they affect the title to the premises covered by his mortgage. The deed contains a recital in these words: "This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part, for a conveyance thereof to one Ezra W. Acer, of whom the said party of the second part has become the assignee or purchaser, and, as such, entitled to a fulfillment thereof, by virtue of this conveyance; said contract being dated, January 29, 1864."

This recital, if Westcott looked at it (and it is to be presumed that he did), informed him that, prior to the execution of that conveyance, Acer, by a contract with Mrs. Brown, had acquired a right in equity to the same title in fee which the deed purported to convey to Curtiss; and that whatever right Curtiss had to such conveyance was by virtue of an assignment or purchase from Acer. Westcott thus knew that, so far as such equitable title was concerned, Curtiss acquired it, not through the deed from Mrs. Brown, but by virtue of a prior purchase or assignment from Acer of his contract; and as the deed purported on its face to be executed in fulfillment of the contract by which such equitable title was created, he also knew, that unless the purchase or assignment of such contract was valid, Curtiss had no right to the legal title.

The contract of sale or assignment from Acer to Curtiss was therefore a direct and important link in the chain of title, and Westcott is presumed to have made himself acquainted with its provisions so far as they affected the title incumbered by his mortgage. By the terms of that contract, Curtiss expressly agreed with Acer to execute a mortgage on the property for \$3,380.20, with interest, and to insure the premises for \$3,000 payable to Acer to secure the mortgage.

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The general rule is, that when a purchaser cannot make out a title, but by a deed, which leads him to another fact, he shall be presumed to have knowledge of that fact. (Story Eq. Jur., vol. 1, p. 428, § 399.) "Indeed," says Judge STORY, "the doctrine is still broader; for, whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances and persons), is, in equity, held to be good notice to bind him." (Id.) In the present case, the contract was in writing, and each party to it had a duplicate in his hands. The recitals in the deed directed Westcott with certainty to the contract and the parties to it; and as, on inquiry of either of the parties, he could have learned the terms of the contract, he is presumed to have acquired the information which would have resulted from such inquiry.

Westcott testified before the referee that he did not know the contract between Acer and Curtiss was in writing; that he supposed it was verbal, and that he also supposed Acer had been paid in full. If he relied on his suppositions in respect to these particulars, instead of making such reasonable inquiry as was in his power, he did so at his peril. He was not misled by the recitals in the deed. The deed asserts nothing contrary to the fact that the purchase money from Curtiss to Acer was unpaid, and that Acer was entitled to a mortgage on the property to secure its payment.

The doctrine, that a purchaser is presumed to have knowledge of every fact to which he is led by a deed, forming a link in the chain of his title, is none the less applicable to the contract between Acer and Curtiss, because such contract transferred a purely equitable interest in the land, and not a legal title. The equity of Acer, as has been said, was a right to a conveyance, which would vest in him the entire estate, legal and equitable. While that right resided in him, the legal title outstanding was a mere shell. Westcott's mortgage would have been of but little comparative value as a security, if such equity had not been subjected to its lien. The case is, therefore, fully within the reason of the rule above stated, and Westcott is presumed to have looked at the contract from

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Acer, because it was essential to the validity of his mortgage, or rather to its sufficiency for the purpose for which it was executed.

Westcott being chargeable with notice, his entire mortgage should be postponed to Acer's equity.

It is insisted on his part, however, that in any event, he should be preferred to the extent of the \$550, advanced by him to Curtiss, and by the latter paid to Mrs. Brown. That position cannot be maintained, unless Westcott is entitled to be subrogated to the right of Mrs. Brown, to have such sum recovered by a first mortgage. No such right of subrogation exists. Westcott did not deal with Mrs. Brown. He lent the money to Curtiss for the purpose of enabling him to pay Mrs. Brown, and procure a deed, and upon the express agreement, that Curtiss should execute a mortgage for his security. Curtiss paid, and extinguished the \$550 claim. None of the parties intended that the claim should be transferred or kept alive. It being extinguished, Acer's equity is the first lien remaining. The judgment should be affirmed with costs.

Judgment affirmed.

DAVID WILLIAMS, Appellant, v. JOHN J. BITNER, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

Section 64 of the Code, permits a counter-claim in a Justices' Court, of the same nature, as the counter-claim allowed in actions in this court.

And a defendant may recover upon a counter-claim in that court, to an amount not exceeding \$200, over and beyond extinguishing the plaintiff's claim.

THE facts are stated in the opinion of the court.

G. W. Rawson and *C. S. Baker*, for the appellants, cited 2 R. S., 234, § 50; 2 R. S., 234, 235; 2 E. D. Smith, 317; 37 How., 299.

J. A. Stull, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

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By the Court—JAMES C. SMITH, J. Appeal from a judgment of the Monroe County Court in favor of the defendant, on a verdict rendered in that court, upon appeal from a justice's judgment in favor of the plaintiff.

In the Justice's Court, the plaintiff declared on a promissory note, which, as appears from the evidence, was given to him by the defendant for the rent of a farm. The defendant, in his answer, denied the complaint, and also alleged, separately, that he was induced to enter into the lease, and to give the note in suit by false and fraudulent representations made by the plaintiff; and he "consequently claimed affirmative judgment in his favor against the plaintiff, by way of counter-claim, to the amount of \$200."

The plaintiff recovered a judgment before the justice for \$106 damages and costs. On appeal to the County Court the case was tried before a jury, and the defendant recovered a judgment for \$200 damages, besides costs.

It is now claimed by the counsel for the plaintiff, that in rendering such judgment, the County Court exceeded its jurisdiction. The argument submitted is, that the County Court, having only an appellate jurisdiction in the case, could render no other, or different judgment, than might have been rendered in the Justice's Court; that the only case in which an affirmative judgment for damages can be recovered by a defendant against a plaintiff in a Justice's Court, is where he establishes a set-off, which is greater than the claim established by the plaintiff, in which case he may have judgment in his favor, after extinguishing the plaintiff's demand, to an amount not exceeding \$100; and that the counter-claim of the defendant in this case does not consist of matter that can constitute a set-off.

The argument above stated is erroneous in assuming that the right of a defendant to recover damages in a Justice's Court, is limited to the case of a strict set-off. He may set up a *counter-claim* in a proper case, and if he establishes it, may recover on it. The right to set up a counter-claim is expressly given by § 64 of the Code as amended in

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1867. The legislature, in adopting that amendment, are presumed to have employed the term "counter-claim," in view of the definition given to it in section 150 of the Code, which was then in force, and is *in pari materia*. Within that definition, the cause of action interposed by the defendant in the present case is clearly embraced.

As the defendant had the right to set up the counter-claim in the Justice's Court, he had also a right to recover on it in that court, to an amount not exceeding \$200, provided, he established it to that amount, over and beyond extinguishing the plaintiff's claim. In respect to so much of the defendant's counter-claim as remained after the plaintiff's claim was extinguished, the defendant was the actor, and the action is to be regarded as if it had arisen thereon. As such portion of the defendant's claim did not exceed \$200, the justice had jurisdiction to try it, and to render judgment in favor of the defendant for that amount. Since, therefore, the judgment which the defendant recovered in the County Court, was one which the justice had jurisdiction to render, the question whether the County Court, on appeal, can render a judgment exceeding in amount the jurisdictional limit set upon Justices' Courts, does not arise, and need not be considered. The questions of evidence presented by the exceptions require no comment. The judgment of the County Court should be affirmed.

Judgment affirmed.

THE PEOPLE on the relation of JOHN McCONVILLE, Respondent, v. ISAAC HILLS, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

An action in the nature of a *quo warranto* (Code § 432) does not lie against the secretary and treasurer of a railroad company, holding his office as a mere servant thereof, and at the will of its directors.

What constitutes an office, within the meaning of the statute (2 R. S., 581

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Code, § 432), extending this remedy, must still be determined by the general rules of the common law.

The directors of a railroad company are authorized, but not imperatively required, by the general railroad act (Laws 1850, chap. 140, § 6), to appoint a secretary and treasurer.

The right of *de facto* directors of a corporation, to act as directors, cannot be questioned collaterally in an action, to try the title of their appointee, to his office. Per J. C. SMITH, J.

The statute (Laws 1850, chap. 389, § 290, amended 1867, p. 92) giving power to the city of Rochester, as the owner of stock of the Rochester and Genesee Valley Railroad Company, to appoint, through its common council, a portion of the board of directors of said company, does not authorize the election of any person to such board who is not a stockholder in his own right, and qualified under § 6 of the general railroad act. Id.

THIS was an appeal by the defendant from a judgment after trial by the court.

The complaint prayed judgment that the defendant had usurped, and unlawfully held and exercised the office of secretary and treasurer of the Rochester and Genesee Valley Railroad Company, and the rights and franchises appertaining thereto, since the 22d August, 1867, and continued to hold and exercise the same, unlawfully, and for his removal therefrom, and that the relator should be declared to be entitled to the office, &c., since said 22d August, 1867.

The Rochester and Genesee Valley Railroad Company was organized under the general railroad act of 1850. Its articles of association were filed June 10, 1851, and provided for thirteen directors.

The by-laws of the corporation provided that: "The officers of the company, to be appointed by the board of directors, shall consist of a president and vice-president, treasurer, secretary and superintendent, with such number of engineers and other subordinate officers and agents as the directors shall from time to time think proper to appoint;" also, that the president and vice-president should be annually appointed, and that "all other officers or agents of the company, shall hold their respective places during the pleasure of the board of directors."

There were 9,755 shares, of \$100 each, of the capital stock

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of the company subscribed for, and certificates had been issued for 5,552 shares of full paid up stock.

The city of Rochester was the owner of \$300,000 of the paid up stock, for which it had subscribed, pursuant to authority, given under chap. 389, p. 757, Laws 1851, § 285, &c.; and by the action of the company in accepting such subscription, was entitled (§ 290) to nominate and appoint one director of said company for every seventy-five thousand dollars of said stock, which right it exercised until the annual election of the company in 1865.

An act was passed March 9, 1867 (Laws 1867, chap. 59, p. 92), amending the act of 1851, and giving the common council of the city, power to appoint one director for every \$42,855 $\frac{1}{4}$ of its stock, *i. e.*, seven directors instead of four.

On the 13th June, 1867, the common council of the city, elected seven directors of the company for the year ensuing, three of whom were not stockholders, nor qualified to vote for directors in the company, but who were citizens of Rochester, and tax-payers therein; and on the same day a regular annual meeting of the stockholders of the company was held, whereat nine other persons were chosen as directors for the same time.

On the 22d August, 1867, the seven persons elected by the common council as directors met in due form, and organized as a board of directors, and appointed the relator, secretary and treasurer, in place of the defendant, who had been appointed to that office on the 12th of June, 1862; and upon this removal and appointment the relator based his claim to the judgment asked by him.

Theodore Bacon, for the appellant.

W. F. Cogswell, for the respondents.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

By the Court—JAMES C. SMITH, J. This is an action in the nature of *quo warranto*, to oust the defendant from the

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offices of secretary and treasurer of the Rochester and Genesee Valley Railroad Company, a corporation organized under the provisions of the general railroad act, passed by the legislature of this State in 1850 (ch. 140).

The cause was tried at the Monroe circuit in April, 1868, without a jury, and a judgment was ordered *pro forma*, in favor of the plaintiffs.

Upon a careful examination of the case, after argument by counsel, on appeal, I am satisfied the judgment cannot be sustained.

We regard the constitutional question raised by the appellant's counsel as virtually decided by this court on a former occasion (46 Barb., 340), and therefore do not consider it.

But there are other points in the case fatal to the plaintiff's claim.

The "offices" in dispute are not offices for which this action will lie, for the reason that the secretary and treasurer are mere servants or agents of the company holding at the will and pleasure of the directors.

The act under which the company was organized, provides that "the directors shall appoint one of their number president; they may also appoint a treasurer and secretary, and such other officers and agents as shall be prescribed by the laws" (§ 6).

The provision does not make it the imperative duty of the directors to appoint a secretary or treasurer; they may themselves, if they prefer, perform by committee, or otherwise, the duties usually devolving on those officers; and the secretary and treasurer, when appointed, are removable at any time at the pleasure of the directors, or at least for cause satisfactory to them.

The only effect of a judgment against the defendant would be his removal from office; but such a judgment would be nugatory, for the directors might immediately reinstate him. (*Commonwealth v. Dearborn*, 15 Mass. 125; *The King v. Corp. of the Bedford Level*, 6 East., 356.)

In England, the rule has been laid down, that *quo war*

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ranto will lie for usurping any office, provided the office be of a public nature; and a substantive office, not merely the function or employment of a deputy or servant, held at the will or pleasure of another, in which latter case, the information will not properly lie. (*Darley v. The Queen*, 12 Cl. & Fin. 520, 541; *The Queen v. Fox*, 8 Ell. & Bl.; 92 E. C. L. R., 939; *The King v. Justices of Herfordshire*, 1 Chitty, 700; 18 E. C. L. R., 206)

Our statute (2 R. S., 581, § 28; Code, § 432), has extended the remedy to any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; but the question, what constitutes an "office" within the meaning of the rule laid down by the cases above cited, is not affected by the statute.

The respondent's counsel argues, that the action can be maintained, as it necessarily involves the validity of the election of the directors constituting the board of directors, by whom the respective claimants were appointed. But the action is not brought to oust the directors who appointed the defendant; they are not parties to the suit; they will not be bound by the judgment rendered in it; and, as has been said, if the defendant should be removed by the judgment, they could reinstate him. I apprehend, the title of the directors, by whom the defendant was chosen (who were at least directors *de facto*), cannot be inquired into, collaterally, in this action. (*Symmers v. The King*, Cowp., 489, per LORD MANSFIELD, p. 507; *The King v. Mein*, 3 T. R., 596; *The King v. Hughes*, 4 Barn. & Cr., 368; 10 E. C. L. R., 358; *People v. Stevens*, 5 Hill, 616, per BRONSON, J., 629, 630.) It can only be attacked directly in an action for that purpose.

But if it were competent, in the present action, to inquire into the validity of the title of the directors constituting the board of directors, by whom the respective claimants were appointed, it would be found that four of the seven, by whom the defendant was removed, and the relator was appointed, were ineligible at the time of their election, by reason of the fact that they were not then stockholders of the company.

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The general act provides, that no person shall be a director of a corporation formed under its provisions unless he shall be a stockholder, owning stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen (§ 5). The counsel for the relator insists, that this provision has been repealed by subsequent acts, enabling the city of Rochester to become a stockholder, and to elect a certain number of the directors. (Laws 1851, chap. 389, §§ 286, 290; Laws 1867, vol. 1, p. 92, chap. 59.)

That construction cannot be upheld. The acts of 1851 and 1867, contain no express repealing words; they do not mention the provision of the act of 1850, claimed to be repealed, or refer to it in any way; and they are not contrary to it. Both acts are merely affirmative, and may stand together.

The policy of the requirement, that none but stockholders shall be eligible to the office of directors, is obvious, as well in the case of the directors chosen by the city, as of those elected by the stockholders at large. It is, that each member of the board of directors shall have a direct pecuniary interest in the welfare of the road. Under the act of 1867, the city may choose a majority of the board. There is nothing in the language of the act to warrant the implication, that the legislature intended that persons, not stockholders, should control the affairs of the corporation, or that all the directors should not be subject to one and the same rule of eligibility.

These views lead to a reversal of the judgment.

Judgment reversed.

CHARLES H. GAGE, survivor of JOHN H. GAGE and CHARLES H. GAGE, Respondents, v. SAMPSON JAQUETH, Appellant.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

A writing, which is, in form, a bill of lading, but signed only by the consignor, is not a bill of lading.

In an action brought against a carrier by a consignee to recover damages

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for injury to goods, while *in transitu*, the plaintiff gave in evidence a writing in the usual form of a bill of lading, signed by the consignor only, by which it appeared that the defendant had received the goods for transportation, subject to the ordinary liabilities of a common carrier.—*Held*, defendant might show in defence a contract to carry, subject to the owner's risk.

Irrespective of the statute of frauds, a party who has not signed a written agreement, is not bound by it.

The remarks in *Worrall v. Munn* (1 Seld., 229), to the contrary, disapproved. A written instrument, adopted by parties as containing a contract between them, but not mutually signed, is not conclusive evidence of such contract.

APPEAL from a judgment upon a verdict for plaintiff, on a retrial before the County Court of Onondaga county.

The action was brought to recover for damage to sugars, which the defendant had undertaken to transport and deliver to the consignee.

Plaintiff proved the delivery of a cargo of sugar to the defendant's agents on the 21st May, 1868, for transportation to Syracuse by canal, and also the delivery of the following writing to the defendant's captain :

“NEW YORK, *May* 21st, 1868.

“Shipped by C. H. Gage & Co., on board boat *Fannie Jaqueth*, of Liverpool, Capt. J. W. Peiton, the following goods, in apparent good order, viz.: (Description of goods.)

“On safe delivery of all the above, as consigned, Messrs. J. H. Gage & Co., pay captain one dollar per ton, less seventy-seven 48-100 dollars, advanced to the captain.

“C. H. GAGE & Co.”

The sum of seventy-seven 48-100 dollars was credited on the bill in part payment of the freight.

Plaintiff also proved damage to the sugar on account of defects in the defendant's boat.

The remaining facts are stated in the following opinion :

J. A. Clark, for the appellant.

R. H. Gardner, for the respondent.

Present—BACON, FOSTER, MULLIN and MORGAN, J.J.

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By the Court—MULLIN, J. It appears by the case that there was a firm by name J. H. Gage & Co. at Syracuse, and a firm by the name of C. H. Gage & Co., at New York. The former firm was composed of C. H. Gage and J. H. Gage. Who compose the latter firm does not appear.

The former firm was dissolved on the 19th May, 1868, by the death of J. H. Gage.

On the 21st the contract between the parties for the carriage of the sugar mentioned in the contract was made and the sugar delivered to the defendant to be carried to Syracuse.

A contract with the firm of J. H. Gage & Co., could not then be made; but must have been made with the survivor, C. H. Gage. He alone could sue upon it.

J. H. Gage & Co. being the consignees of the sugar are to be deemed owners, and entitled to sue for loss of, or injury to it, by the carrier.

C. H. Gage, being survivor of the firm was entitled to receive the sugar, and to sue the carrier if not delivered in good order. Adding the word survivor does not impair his right; it is a mere *descriptio personæ*.

If I am right in the foregoing views of the relations of the parties, it is wholly immaterial who composed the firm of C. H. Gage & Co. They are the consignors merely. And as a firm, so far as we know, without interest in the sugar.

The objection to the plaintiff's right to recover because of any defect of the parties was properly overruled.

The action being for the injury to the property while in the possession of the carrier, the price at which the property was to be carried was a matter wholly immaterial to that issue.

If, by the contract between the consignor and carrier the goods were to be at the risk of the owner, that was a matter of defence, and proof of it devolves on the defendant.

The plaintiff, however, put in evidence what he claimed to be the contract under which the goods were carried; and by it the carrier received the property subject to the ordinary liability devolving on common carriers; one of

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which is, responsibility for injuries to the property, not resulting from inevitable accident or the public enemy.

The defendant, by way of defence, offered to prove by parol, that by the agreement between him and the consignors, the goods were to be carried at the risk of the owner; and, as a consignor, he was not liable for such injury.

The evidence was rejected on the ground that it contradicted or varied the written contract put in evidence by the plaintiff, and which was taken to be the contract under which the goods were carried.

That contract was in writing and in form a bill of lading; but it was signed by the consignors only, and not by the captain of the vessel on which the sugar was laden, nor by any other person on the part of the defendant.

The contract was not a bill of lading, as it was not signed by the captain or the defendant. (*Dows v. Greene*, 24 N. Y., 638, and cases cited.)

But it was competent for the parties to enter into an agreement not in form a bill of lading; and such contract, if proved, will bind the parties as effectually as a bill of lading.

The question then is, was the defendant bound by the writing, as being the contract under which the sugar was carried?

It will be borne in mind that it is not signed by the defendant, nor by any one representing him. The captain received the paper, carried it with the goods to Syracuse, and there delivered it to the consignees.

As a general proposition, no person is bound by a written agreement who has not signed it. (*Wood v. Edwards*, 19 J. R., 205; *Townsend v. Corning*, 23 W., 435; *Tucker v. Woods*, 12 J. R., 190.)

The question as to what constitutes a contract, minute, or memorandum of a contract, has frequently arisen in England under the stamp acts. The courts have generally leaned to give full effect to those acts, by bringing within their operations all instruments which could by reasonable intendment be held to be reached by them.

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In *Doe v. Pedgriph* (19 E. C. L., 402), it appeared that in an agreement for the letting of certain houses, which was put in writing by the lessee's agent, but was not signed by either, both parties signed a writing on the back of the draft, in the following words: "We approve of the within draft." It was objected to the introduction of this paper, that it was not stamped.

The court, however, held that it was not a contract, minute, or memorandum of a contract, and hence need not be stamped. It was a mere statement of what they intended to agree to.

It was held in *The King v. Inhabitants of Leicester* (2 A. & E., 212), that a writing drawn by lessor's agent and signed by the unauthorized agent of the lessee, containing the terms of the letting, but not signed by the lessor, was not a lease, nor an agreement for a lease; and hence the pauper, who was named as lessee, did not gain settlement by occupancy under such agreement.

See, also, *Vaughton v. Brine* (39 E. C. L., 484); *Chadwick v. Clarke* (50 E. C. L., 699); *Drant v. Brown* (10 E. C. L., 211); *Doe v. Cartwright* (5 E. C. L., 306); *Hawkins v. Warre* (5 D. & R. 512); *Parker v. Dubois* (1 M. & W., 30); *Wilson v. Bowie* (12 E. C. L., 18); *Stevens v. Pinney* (4 E. C. L., 167).

There is a class of cases, in which it has been held that a party who does not sign a contract may enforce it, and may be made liable upon it at law as well as in equity. (*Ballard v. Walker*, 3 John. Cases, 60; *Roget v. Merritt*, 2 Caines, 117; *Gale v. Nixon*, 6 Cow., 445; *Worrall v. Munn*, 1 Seld., 229, and cases cited by PAIGE, J.)

The cases cited, and all others belonging to the same class, are cases within the statute of frauds, as they arise on contracts for the sale of lands or goods.

It was competent for the legislature to prescribe a mode of executing contracts which would bind all parties to them, although part only should sign them; and this is precisely what courts hold the legislature has done, in the enactment of the statute of frauds.

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The contract before us, is not within the statute, and the consequences resulting from an omission of the defendant to sign it are not removed by the statute.

I have been unable to find a case in which it has been held, that a party named in a written agreement was liable upon it when he had not signed it. PAIGE, J., in *Worrall v. Munn*, *supra*, says: This principle (that a party not signing a contract executed in conformity to the statute of frauds, was liable upon it if he accepted and acted upon it), was applied to contracts not within the statute in *Randall v. Van Vechten* (19 J. R., 60); *Bank of Columbia v. Patterson* (7 Cranch, 299); and in *White v. Cuyler* (6 Term R., 176). I do not so understand the cases.

In *Randall v. Van Vechten*, the defendants were a committee of the common council of Albany, authorized to employ a surveyor, and to cause to be made a survey of said city, with maps, &c. The committee entered into an agreement with the plaintiff in their individual names, and sealed with their respective seals, as party of the first part for the performance of said work. The plaintiff sued. The defence was, that the work was done for the city. The court held defendants not liable; that the contract was so executed, as to give an action against the city, and if not, defendants were liable. The contract being neither signed nor sealed by the corporation, it was not liable in covenant; but as the defendants were authorized to bind the city, their signatures bound it, but the contract was a parol contract merely, not a covenant.

The *Bank of Columbia v. Patterson*, was in all respects similar to the former, and the ruling was the same.

In *White v. Cuyler* the action was *assumpsit* for the passage money of the plaintiff from Barbadoes to England; the defendant's wife entered into an agreement to employ plaintiff to accompany her to Barbadoes; and if she dismissed plaintiff, to pay her passage home. Mrs. C. was not authorized to execute agreement for her husband under seal. It was held that *assumpsit* would lie.

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In this case, Mrs. C. was the agent of her husband, and as such, capable of making the contract with the plaintiff, but could not bind him by a seal. As in the other cases referred to, assumpsit lay upon the agreement; but not covenant. See, also, *Hanford v. McNair* (9 Wend., 54.)

When the parties to an agreement have caused it to be reduced to writing, and hence recognize it as containing the terms finally agreed upon between them, but have not signed it, there are very good reasons for refusing other evidence of the contract.

But if the mere verbal assent of the parties to the correctness of the writing, is to obviate the necessity of signing in one case, or class of cases, it must in all; and thus the written contract would be practically dispensed with.

It would not be claimed that if an unsigned note was delivered by a person, who should be maker, to the payee, accompanied with the declaration that it contained his promise which he would perform according to its terms, it would become thereby a promissory note, and that it could be enforced as such.

Such a paper is, however, some evidence of indebtedness and may be used for that purpose. But it is of no more force than a mere verbal promise would be. It is evidence liable to be rebutted by the parties sought to be charged.

It is only when the contract is completed by the signing of the parties that it becomes the evidence, and the best evidence of the agreement of the parties. Until then, it is of no greater force than the evidence of a witness.

When a jury is satisfied that an unsigned writing has been adopted by the parties, containing the terms of the agreement, evidence of witnesses varying or contradicting the writing will be received and acted upon with great caution; but such evidence is competent.

If these views are correct the evidence offered by the defendant should have been received.

The judgment of the County' Court should be reversed and a new trial ordered in that court.

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All the judges concurring, judgment is reversed and new trial ordered in County Court.

Ordered accordingly.

ALEXANDER COPLEY and EDWIN J. HARLOW, Respondents, v.
MICHAEL O'NEIL, Appellant.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

The defendant, owning and occupying a house and lot, conveyed the same to his infant daughter, who resided with him as a member of his family and the house being destroyed by fire, employed the plaintiffs to build him a dwelling, upon the old foundation; the plaintiffs performed the work, and filing the required notice (Laws 1854, p. 1086, chap. 204, extended Laws 1858, p. 324, chap. 204), claimed a mechanic's lien, for the value of the labor and materials; defendant took possession of the new house, and continued to reside there with his said family. In an action under the statute for judgment, as upon a mechanic's lien,—*Held*, the defendant had no interest in the house erected, other than as guardian of his daughter, and the plaintiffs had obtained no lien thereon.

Section 20, 2 R. S., 153, by which a guardian is authorized to sustain and keep up the houses, &c., of his ward, does not include rebuilding.

Held, further, defendant could not, by contract with himself as guardian, become a tenant of the property.

Nor could he give to himself a license to erect and remove the building.

And it seems, when a guardian erects a building, especially a dwelling, on the ward's land, it becomes a permanent annexation, however attached to the soil.

APPEAL from a judgment entered in favor of the plaintiff, upon the report of a referee in an action under the statute, to enforce a mechanic's lien.

The defendant and his deceased wife had owned a lot of land and dwelling thereon, under a conveyance to them jointly; after the wife's death, defendant conveyed without consideration, to his infant daughter, who lived with him on the premises, as a member of his family; the deed bore date April 25, 1867. In the fall of 1867, the house had been burned down, and defendant employed the plaintiffs to erect him a new dwelling, agreeing to pay therefor by subscrip-

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tions, which he had obtained and was to collect, and by a mortgage on the premises.

The plaintiffs completed the house on 4th May, 1868, placing it on the foundation walls of the old building, except on one side, where it rested on the ground; no plastering was used to attach the building to the foundation walls, but the earth was banked up against the sills. On the 14th May, 1868, defendant having failed to meet his promises in the contract, as to the payments and mortgage, the plaintiff filed a notice under the statute (Laws 1854, chap. 204), with the town clerk of the town of Pamela, Jefferson county, where the property was located, and afterward brought this action by notice, as provided by the statute, to enforce the lien which he claimed in consequence.

The referee found, as stated at the close of the following opinion.

B. Bagley, for the appellant.

Moore & McCartin, for the respondents.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—MULLIN, J. Section one of the mechanics' lien law (Laws 1854, chap. 402), gives a lien against the owner to the extent of his interest, upon a house and upon the land on which it stands, for labor done upon, and materials furnished for such bui'ding, upon compliance with the provisions of said act.

Unless the person proceeded against is owner, there can be no lien; and if there is no lien, there can be no judgment under the act.

The defendant and his wife, had owned the land on which the house was erected. The wife died, and upon her death he became sole owner thereof. Before the labor was performed, or materials furnished by the plaintiff, the defendant conveyed said land to his daughter Margaret, who was sole owner at the time of the erection of the house and had been from April, 1867. The bargain for building the house was made in the fall of 1867.

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It is thus conclusively established that defendant did not own the land on which the house stood at the time of the commencement of proceedings to acquire a lien.

Was he at that time or at any other time owner of the house?

The daughter who owned the land was, and still is, a minor. The father was her guardian. She lived with him. The dwelling-house was burned and he proceeded to erect another.

As guardian, he could not, without the authority of a competent court, erect a house on the ward's land and charge the expense upon the ward. (*Hassard v. Rowe*, 11 Barb., 22.)

In that case, the plaintiff was guardian of the defendants, who inherited from their father two lots of land in the city of New York, the buildings on which had been destroyed by fire. The plaintiff deeming it for the interests of his wards that new buildings should be erected on the lots, used the insurance money received on insurance on the old buildings, and added to it moneys of his own, and erected new buildings. He filed a bill to compel the repayment to him of the moneys so advanced by him.

The bill was dismissed on the ground that the plaintiff could not, without authority of the court, expend his money in improving the land of the ward, and be reimbursed out of the ward's estate.

If the guardian could not charge the estate of his ward for advances made by himself, it would be difficult to apprehend, how he could effect the object by employing another to make such advances.

By 2d statutes at large, page 150, § 20, a guardian is authorized to sustain and keep up the houses, gardens and other appurtenances to the lands of his wards, by and with the issues and profits thereof, or with any other moneys of his ward in his hands.

Keeping and sustaining the houses, &c., of his wards, does not include rebuilding; if it did, the case of *Hassard v. Rowe*, would have been decided the other way.

The chancellor held, in *Putnam v. Ritchie* (6 Paige, 390),

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that a person who, under a misapprehension of his legal rights, had made large and valuable improvements on lands of minors, they (the minors) were entitled to the improvements, but were not bound to pay for them. And he further held that the minors were not chargeable with fraud or acquiescence until they became acquainted with their legal rights.

In the case cited, the plaintiff had taken from the mother of the defendants, a release of a lease in fee of the premises in question, in the suit, of which defendant's father died seized. She supposed the lease was assets, and that it was for the interest of the children to be relieved from the payment of the rent; and after plaintiff obtained the release, he entered and made the improvements, for which he sought compensation. The defendants had recovered the premises in an action of ejectment, and the bill was filed to restrain that suit, until defendants paid him for his improvements. His bill was dismissed.

In the case before me, the plaintiffs are charged with notice of Margaret's title to the premises, at all events they are chargeable with notice, that defendant had no title to them when the bargain for erecting the house was made.

And they have no reason to complain, if, with such knowledge, they did the work and furnished the material sought to be charged as a lien on the house.

The defendant being guardian, and, as such, having charge of the ward's land, his possession of it was in his capacity of guardian and could be in no other. He could not by a contract with himself create the relation of landlord and tenant, and hence his occupation could not be that of a tenant even at will.

It is doubtless true that a guardian would be liable to account to his ward for the use of the ward's lands, if he occupied them for his own benefit. But such liability is not as tenant but as a debtor; having omitted to let the premises to others, he must account for what he ought to have received from them.

Permission to erect on the ward's land a building with the right of removal, could only be obtained from the guardian,

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this again made necessary a contract by defendant with himself. So that plaintiff cannot claim even a license to erect and remove the building, that is binding on the ward.

When the guardian erects a building, especially a dwelling, on the ward's land, it must be a permanent annexation however it may be attached to the soil; and this presumption is very much increased when the person erecting the building is the father of the ward.

I am unable to discover any ground on which the defendant can be held to be owner of the house; and not being owner, there can be no lien.

Whether, on the facts proved, the plaintiff can in equity obtain a lien on the house, or on the house and land, is a question not before us and upon which I express no opinion. If there is any such relief, it is open to the plaintiff, if the lien sought to be enforced in this proceeding fails.

It is suggested by the plaintiff's counsel that defendant's counsel has served no exceptions to the finding of the referee, and hence he cannot assail the findings either of fact or law. In this he appears to be mistaken; the case contains exceptions to both.

The referee finds the facts as to the ownership, precisely as they were proved by defendant. He had, therefore, no ground for excepting to the facts.

The exception to the conclusions of law is "to all the findings, as matter of law." By the decisions of the Court of Appeals, such an exception is too general, unless all the conclusions of law are erroneous. (*Magie v. Baker*, 14 N. Y., 435.)

His conclusions are, 1st, that the defendant was owner this is, in my opinion, clearly erroneous.

The 2d is, that plaintiffs, by their notice, obtained a lien on the house; this is erroneous, if defendant was not owner.

The 3d is, that plaintiffs were entitled to judgment for their debt and costs.

This is also erroneous, as in this proceeding no judgment can be rendered for debt and costs unless a lien has been obtained.

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The exceptions to the conclusions of law are, therefore, sufficient, and they are before us for review.

The judgment should be reversed, with costs. As a new trial would be of no benefit to the plaintiffs, none should be ordered.

All the judges concurring, the judgment is reversed.

HENRY NOYES, Respondent, v. FRANK M. TERRY, Appellant.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

Unattached scantling, which had been used to hang tobacco on to cure, in a barn, built on a farm where tobacco had been raised, which were put up and taken down, as they were, or were not wanted for the drying of the tobacco; and at the time of the sale were partly piled up in the barn, and partly used as a scaffolding for straw; no tobacco having been raised on the farm for a year or two previously.—

Held, not to pass as fixtures by a conveyance of the farm.

In determining what will pass as fixtures by a deed conveying the freehold, the distinction between things actually annexed, and things totally disconnected, is one of the most easy and certain application, and should be maintained, except where the exigencies of trade, or long established usage, or precise authority has established an exception.

The case of *Bishop v. Bishop* (1 Kern., 123), explained and distinguished.

PLAINTIFF sold defendant a farm, and left on it certain lumber and stone; and having subsequently demanded these articles from defendant, who refused to surrender them, he brought this action to recover their value. Defendant answered that he had bought and paid for them as part of the farm. The action was referred; and the facts, as proved on the trial, and found by the referee, are fully stated in the opinion.

The referee decided as matter of law, that the lumber was personal property, and did not pass by a conveyance of the real estate, and ordered judgment for plaintiff. And defendant having excepted to the decision, appealed from the judgment entered thereon.

D. Pratt, for the appellant.

Graves & Stevens, for the respondent.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

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By the Court—BACON, P. J. The law of “fixtures” is confessedly the most uncertain title in the entire body of our jurisprudence; and a judge might, in any given case, decide either way without much danger of having his judgment impeached, or of failing to find some authority to support it. It follows that almost every case that is presented, must be tested and determined by the special facts which it exhibits. The question here arises between vendor and vendee, and the point to be determined is, whether certain scantling remaining on the farm which was the subject of the sale, did, or did not come within the category of fixtures. If not, the plaintiff had the right to recover for them; if they did, the defendant was justified in retaining them.

The finding of the referee is substantially that the lumber in question had been used by the plaintiff for some two or three seasons to hang his tobacco upon; the scantling was not fitted into the barn, or shed, but was put up and taken down as needed, for the drying of the tobacco when raised. This scantling had not been used for one or two years before the sale of the farm, the plaintiff not having raised any tobacco during these years; but such scantling was necessary, or something of like character to enable the crop to be properly cured. At the time of the sale of the farm, the scantling lay piled up as they were left when the last crop was raised, except a small portion upon which some straw had been piled. On these facts the referee found, as matter of law, that the scantling and a small quantity of stone about which no question is made, were personal property, and did not pass to the defendant by the sale of the farm, and he accordingly found for the plaintiff, assessing his damages at some \$115.

The question arising in this case is not one of the easiest solution, and a good deal may be said on both sides. My conclusion upon the whole, is that it was rightly decided. It would be but a waste of time to go over the cases at length. That was done by Judge COWEN in the leading case of *Walker v. Sherman* (20 Wend., 636). The opinion covers

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twenty-one pages, and in the course of it over sixty cases are cited and commented on, and yet from them all it is difficult, if not impossible, to extract any general rule that shall embrace every case that may arise. The rules existing between vendor and vendee, landlord and tenant, mortgagor and mortgagee, are somewhat variant. We are only concerned with those which apply to the first named relation. As respects vendor and vendee, Judge COWEN says the general rule is that anything of a personal nature, not affixed to the freehold, cannot be considered as an incident to the land. This rule has of course some exceptions, and will not apply to a temporary disannexing, such as a mill-stone to be picked, or an anvil to be repaired, or locks and keys to houses. He says further that whatever the use or object, unless the thing be physically annexed to the freehold in some way, it has in general been held not to pass as between vendor and vendee. And he cites the case of a padlock, *and loose boards used for putting up corn in the bins of a corn house*, as was held in the case of *Whiting v. Barstow* (4 Pick. 311), a case which comes nearer to the one now before us than any I have found in the books. That case was decided upon the precise principle that the boards were loose, and movable without any injury to the freehold. The distinction between things actually annexed and things totally disconnected is one of the most easy and certain application, and should be maintained except where the exigencies of trade, or long established usage, or precise authority has established an exception.

Judge COWEN sums up the whole discussion by saying, that, as a general rule, in order to come within the operation of a deed conveying the freehold, nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture, by being in some way permanently, or at least habitually, attached to the land, or some building upon it. The definition of Judge INGRAHAM, in *Hoyle v. P. & M. R. R. Co.* (51 Barb., 62), agrees substantially with this; adding, however, a further qualification, that the thing must be essen-

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tial to the use of the realty, and without the use of such or similar articles, the realty would cease to be of value. Tested by these rules, which are the nearest approximation we can make to one appropriate to this case, the scantling, unattached as it was, of uncertain and intermitted use, and not absolutely essential to the enjoyment or value of the realty, cannot be considered as bringing it within the legal definition of a fixture. The case of the hop-poles, *Bishop v. Bishop* (1 Kern., 123), which is conceded to have carried the rule to its extremest point, is only to be sustained on the precise ground on which it is put, to wit: That as the hop-root is perennial, and would pass to a purchaser, so the pole, which is used exclusively in connection with it, and is indispensable to its cultivation, passes equally to such purchaser. In this case Judge DENIO dissented in an able opinion, concurred in by Judge JOHNSON. He held that there was no such affixing to the land as to convert the poles into real estate, and that thus to convert personal property by virtue of the law of fixtures, there must be a permanent corporeal annexation of the chattel to the land, or to something which is itself annexed to the land, thus reaffirming the doctrine of COWEN in the case of *Walker v. Sherman*. Although the purpose for which the poles were used recurred annually, it was after all only temporary and occasional. Such was the use of the scantling in this case, and this use did not change their essential character as chattels.

I think the judgment is right, and should be affirmed.

Judgment affirmed.

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THE PEOPLE ex rel. JEREMIAH COOPER v. NEWCOMB FIELDS.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

Where the complaint in proceedings for a *forcible entry and detainer* is defective, for omitting to set out the nature of the complainant's title or interest in the premises, and the objection is properly taken before the county judge and overruled, the defendant, after the proceedings are brought into this court by certiorari, should renew the objection before

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he traverses the inquisition. *After verdict* for the relator upon such defective complaint, it is too late to make the objection, but the verdict will be sustained if the facts proved on the trial are such as entitle the relator to the protection of the statute.

It is competent for the defendant, in these proceedings, to disprove the facts relied upon by the complainant to establish his possession.

The inquisition found the defendant guilty of both a forcible *entry* and *detainer*. On the trial of the traverse, the petit jury found the defendant *not guilty* of a forcible entry, but guilty of a forcible *detainer*. It seems the verdict, if right upon the merits, may be sustained as to form.

Upon a former trial, the relator was nonsuited, and this court granted a new trial. (See 52 Barb., 198.) The doctrine of that case is approved, so far as it holds that *naked possession* or *occupation* is sufficient evidence of title to enable the occupant to maintain these proceedings against a stranger without title.

Upon the last trial it was proved, or evidence was offered and rejected tending to prove, that the shop of the relator originally belonged to one Fish; that Fish obtained permission of the owner of the land to put it upon the lot on part of which it stood, without the payment of rent or other compensation, where it was to remain until the owner should require it to be removed; that the defendant afterward purchased the lot, and, with the consent of Fish, commenced excavating, for the purpose of erecting a block of stores; that Fish agreed to move off the shop, and was making preparations to do so, when the relator purchased it of Fish, and claimed a right to occupy the land on which it stood. The defendant then moved the shop into the public highway, and, by the verdict of the jury, was guilty of "*forcible detainer*" in keeping the relator out of possession. *Held*: (1). That if Fish was to be regarded as a tenant of the owner, it was strictly a tenancy at will at common law, and was terminated without notice to quit, by the very act of transfer, under color of which the relator acquired title to the shop:

(2). That the defendant, having entered into possession of part of the premises, with the assent of Fish, before the sale of the shop to the relator, must be deemed in the *constructive* possession of the whole; and that the relator, having attempted afterward to occupy the lot with his shop, was a mere intruder upon the possession of the defendant.

(3). The jury, having negatived the charge of a *forcible entry* upon the premises by the defendant, there is no ground upon which the relator can claim *constructive possession*, so as to sustain the verdict for a *forcible detainer*, as against the owner in actual possession.

And per MORGAN, J. To authorize proceedings for a *forcible detainer*, the entry must be an *unlawful* entry, followed by a *forcible* detainer.

An entry by a person entitled to the possession is not unlawful, although made against the will of the party in possession; such person may enter peaceably upon the party in possession without right, by the very terms of the statute.

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To entitle the complainant to the protection of the statute, he must have at least a *right to the possession*. (2 R. S., 508, §3.) And a complaint would be fatally defective if it alleged *possession* only, without alleging a *right to it*.

A right of possession gained by *disseizin* is sufficient. So *it seems*, one who enters under a valid lease or contract of sale and who is holding over after his term has expired, or his contract has become forfeited, may be deemed still seized of his original estate, and entitled to the protection of the statute against a forcible entry upon his possession by the owner.

But one, placed on the lands of another, without any terms prescribed or rent reserved, is not within the protection of statute; but is strictly a tenant at will at common law. An entry by the landlord, and notice to quit, will terminate the tenancy, and revest the possession in the landlord, though the tenant be not actually turned out.

A parol license to enter upon another's premises, to erect and maintain a house is revocable and confers no right whatever upon the licensee to occupy the premises after it is revoked.

Such a license operates only as an excuse for the act, which would otherwise be a trespass, and confers neither possession nor right to possession as against the owner, within the meaning of the statute.

MOTION for a new trial upon a case and exceptions by defendant after verdict for the relator, finding the defendant guilty of *forcible detainer*, but not guilty of *forcible entry*.

Motion by the relator for an order of restitution.

Appeal from the order of the court at Special Term, denying a motion made by the defendant to quash the proceedings on account of the insufficiency of the complaint.

All these motions were heard together. The preliminary proceedings before the county judge, and the subsequent proceedings before the traverse was sent down to the circuit for trial, are set out at length in the case, as reported in 52 Barb., 198, which renders it unnecessary to recapitulate them here. The additional facts and circumstances appearing upon the last trial are referred to in the opinion of the court.

D. Pratt, for the defendant. The complaint was not sufficient. It did not allege that the relator had an estate in freehold, or for a term then subsisting, or some other right to the possession thereof, as required by the statute.

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(2 R. S., 508.) It is not enough to allege, generally, that the party is entitled to possession. The particular title showing the right of possession should be set forth. (Rev. Notes, 5 R. S., 492; *People v. Nelson*, 13 J. R., 340; *Carter v. Newbold*, 7 How., 166; *People v. Shaw*, 1 Caines, 125; *Same v. King*, 2 id., 98; *Same v. Reed*, 11 Wend., 157.) It is not sufficient to allege circumstances from which a title may be inferred. In pleading, facts must be alleged, and not the evidence of facts. Besides, the statute requires, peremptorily, that the nature of the title be set forth in the complaint.

The complaint not being sufficient to give the officer jurisdiction, the proceedings may be quashed at any stage of the proceedings. (*People v. Smith*, 24 Barb., 16; *People v. Reed*, 11 Wend., 157.) The proceedings are special, and are, therefore, subject to the rules applicable to courts of limited jurisdiction. (*Thatcher v. Powell*, 6 Wheat., 119; *Denning v. Corwin*, 11 Wend., 647, 652; *Smith v. Fowle*, 12 Wend., 9, 11.) When the want of jurisdiction appears, the judgment of any court will be void. (*Bloom v. Burdick*, 1 Hill, 130; *Varnum v. Wheeler*, 1 Den., 331; *Seaman v. Stoughton*, 3 Barb. Ch., 344; *Dresser v. Brooks*, 3 Barb., 429.)

Under our statute it is all important that the relator should be required to state in his complaint, his title, and swear to it, as it cannot be controverted upon the trial; and as he seems to be entitled to restitution, if he succeeds, although he has no right or title whatever. Our statute was designed to establish the law in relation to forcible entry and detainer, in accordance with the law as it was already settled by adjudication. (Rev. Notes, 5 R. S., 493, Edm.'s ed.) It was held in *People v. Nelson* (13 J. R., 340), the nature of the title should be set out in the complaint. The same has been substantially held since the statute. (11 Wend., 157.) Indeed the same was held by this court in this case, as I understand the opinion of Justice MULLIN. He seems to have fallen into an error in regard to the objection being taken before the officer who took the inquisition. (52 Barb.,

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198.) It is therefore submitted, that the motion to quash the inquisition should have been granted.

The decision of the judge upon taking the inquisition was clearly erroneous, and so held by this court. (52 Barb., 198.) It was the duty of the Supreme Court, therefore, upon *certiorari*, to quash the inquisition for any erroneous ruling of the judge upon taking it. (*People v. Nelson, supra*; *Same v. Reed, id.*; *Same v. Smith, id.*; *Carter v. Newbold, id.*; *People v. Wilson, 13 How., 446.*)

The shop in question was not real estate, but a personal chattel, and could not itself be the subject of a forcible entry and detainer. (*Smith v. Benson, 1 Hill, 176*; *Ford v. Cobb, 20 N. Y., 344*; *Ombony v. Jones, 19 N. Y., 234.*) It was not affixed to the freehold, and was capable of severance without injury to the freehold. The owner of the lot and the owner of the building treated it as personal property, and in a state of severance. The owner of the building never claimed any interest in the realty. It was sold to the relator as a personal chattel. Forcible entry and detainer is a wrong done to real estate, and not a wrong done to personal property. (2 R. S., 507; 1 Russell on Crimes, 233.)

No possession was proved in the relator at the time of the alleged forcible entry, but on the contrary, the possession of the premises was in the defendant. There is no pretence of an actual possession of the land by the relator. The shop had been vacant and locked for some two months before the alleged entry. Possession of the land surrounding the shop, had been surrendered to defendant nearly a year before. The relator was not in the *constructive* possession of the premises. The shop being personal property, the fact that it was on defendant's land, would not make the relator constructively in possession. (Russell on Crimes, 309.) A man may be in possession by his wife, children or servant, but his cattle or property on the ground do not preserve his possession. (1 Russell, *supra*; Addison, 43, 316, 353.)

But constructive possession in the relator is not sufficient. He must have the actual possession. (2 R. S., 509.) The

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statute requires that the possession be actual. In cases of forcible detainer, the relator can only show *constructive* possession, but that does not mean constructive possession implied from ownership, but a temporary absence only at the time of the entry. Unless there be possession in another at the time of entry, whatever the degree of force the proceeding cannot be sustained. (Addison R., 43, 316, 353.) The possession must not be scrambling, but quiet, peaceable and actual. (Ashmead R., 140; 17 Conn., 209.) Surveying lands, building cabins, and leaving them unoccupied, is not such a possession as is necessary to prove a forcible entry. (Addison, 43, 316, 353.)

The defendant was in actual possession of the premises. All of the premises except what was actually covered by the shop, was surrendered to the defendant the year before, and he took possession and excavated it for the basement of the store, which he was about to erect. That portion upon which the shop rested was in his constructive possession. Ownership would give him constructive possession in the absence of actual possession by any one else. (*St. John v. Palmer*, 5 Hill, 599.)

But clearly constructive possession of the shop alone would not, of itself, constitute a possession of the lot. The ruling of the learned judge at the circuit was therefore erroneous. There was clearly no actual occupancy of the shop at the time of its removal. It had stood there unoccupied for more than two months.

There being no actual possession of the shop, the least that can be claimed is, that the question of the possession of the lot, must depend upon the intention of the parties. It seems clear to me that if another's horse or wagon be left upon my premises, that that alone would not necessarily put the owner in possession. If this be true, what reason is there for holding that any chattel, left in the same way, would have a different effect. It was, therefore, a question of fact for the jury to determine, whether, when Fish promised to move off the shop, and allowed defendant to excavate, he did not intend to surrender the entire possession of the land.

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The exceptions to the rulings of the justice, in regard to admissions of testimony, and to the charge and refusals to charge, were well taken.

The complaint is for forcible entry, and the jury negative it. The verdict of "guilty of forcible detainer" is not responsive and cannot be sustained.

B. F. Chapman, for the relator. It is too late for the defendant to move to set aside the inquisition after having traversed it. When a party answers in chief a pleading of his adversary, he is precluded from availing himself of the invalidity of the pleading he answers. The rule is applicable to criminal as well as to civil cases, and especially to those like this, which partake of the character of both classes. (1 Leach Crown Cases, 11, 420; 1 Chit. Cr. L., 303.) The inquisition was found June 11, 1863. The return was filed June 25th, and the traverse served July 14th, 1863. The objections to the complaint were known to the defendant and raised by him before the trial and inquisition, June 9, 1863. The objections having been raised to the complaint before the making of the inquisition, and decided, and also raised upon each trial and decided, the defendant derives no new benefit by reason of a special motion. The motion is only necessary, where the defendant failed to raise the objections before the judge before whom the inquisition was taken. (*People v. Field*, 52 Barb. R., p. 210; *The People v. Reed*, 11 Wend. R., 159.)

The statute does not require us to set forth the "title of the complainant." "Stating a conclusion of law" is not objectionable. We state a *fact* that brings us within the statute, to wit; a long, quiet, peaceable and uninterrupted possession, for more than five years." The authorities all hold that to be sufficient. Peaceable possession is *prima facie* evidence of estate so as to bring the complaint within the statute. (11 John. R., 504; see 11 Wend. R., 157; 9 Wend. R., 50; 7 How. Pr. R., 441; 29 Barb. R., 208; 49 Barb. R., 89.)

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The motion to quash has been made, and decided against the defendant; 1st, by Judge HOLMES, June 11, 1863; 2d, by Judge CAMPBELL, February 17, 1864; 3d, by Judge MASON, October 10, 1865; 4th, by Judge BALCOM, February 8, 1868; 5th, by Judge PARKER, February 1, 1869; 6th, by the General Term Fifth District, 1865, on two occasions. (See *The People v. Field*, 52 Barb. R., p. 210.)

The order should be affirmed.

Proceedings will be sustained upon proof of possession alone. Title cannot be brought in question. In this respect the law was changed by the Revised Statutes. Before the revision, the complainant must have had an estate in fee, or for a term of years. (1 R. Laws, 1813, 96, ch. 6, § 1; *People v. Nelson*, 13 J. R., 340.) But under that statute the defendant could not set up title to the premises in his defence. The title could not be tried in that proceeding. (*Clason v. Shotwell*, 12 J. R., 31; *People v. Rickert*, 8 Cowen, 226, N. Y. S. C.; *People v. Godfrey*, 1 Hall, 240.) The right of possession cannot even be brought in question, it is mere actual, peaceful possession. (11 Wend., 157; 7 Howard Pr. 411, *People v. Porter*.) The proof shows that the relator was in actual possession of the premises. There is no dispute as to the facts on this point. An inclosure by a fence gives possession to the inclosed lands. A building, though but slightly fixed to the freehold, is presumptively a part of the realty; *the parties* may control its nature by an agreement that it may be removed at any time, and it being treated by them as personal property, trover will lie by the owner for its conversion. (*Smith v. Benson*, 1 Hill, 176.) But a stranger and intruder could set up no such right to treat a building as personal property. A shanty is a part of the realty. (*Fisher v. Saffer*, 1 E. D. Smith, 611.) Holding the key of an unoccupied building gives such possession as will enable these proceedings to be sustained. (*People v. Runkle*, 9 J. R., 147; *Id.* 8 J. R., 465.) Fences even are part of the freehold; or even the material of which they are composed, unless there is some special agreement to vary

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the rule and make them personal property. (*Goodrich v. Jones*, 2 Hill, 142; *Mott v. Palmer*, 1 N. Y., Comst., 564; *Ford v. Cobb*, 20 N. Y., 344.)

The statute laws of this country have followed substantially the English, and the decisions substantially correspond. Thus, proceedings under the statute may be sustained in case of a forcible entry upon premises not at the time *in the actual occupation of any person, as a church*. (*People v. Runkel*, 8 J. R., 464; S. C. 9 J. R., 147; *Same v. Fulton*, 1 Kernan, 94.) A person may have possession in fact when he was not, in fact, upon the land. (*Chiles v. Stephens*, 3 A. K. Marshall, 340.) Delivery of the keys by the vendor to vendee, with the intention of giving possession, gives sufficient possession to enable the vendee to sustain these proceedings. (*Hoffletter v. Blattner*, 8 Miss., 276.) Locking the doors of a house and keeping the keys, closing the windows and driving stock on the premises, constitutes evidence of an actual possession of land, which will authorize a recovery in an action for forcible entry and detainer. (*Davidson v. Phillips*, 9 Yerger, 93; *Id.* 317.) So in a case of a school-house, of which forcible possession is taken, these proceedings lie. (*Van Hook v. Story*, 4 Humph., 59.) The same doctrine has been held in the case of a mill.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—MORGAN, J. After the decision of this court, in this very case (52 Barb., 198), I think it is too late to question the sufficiency of the complaint before the county judge. Our attention is now called to the fact that the objection was taken before the county judge, which, it is supposed, was overlooked when we made that decision.

But having decided it adversely to the defendant, though erroneously, I am of opinion that it must be deemed the law of the case.

Doubtless, the complainant before the county judge should have stated in what consisted his right to possession, as required by the statute. (2 R. S., 508, § 3.) But the proper

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time to take the objection is before the inquisition is traversed by the defendant. The county judge should have quashed the proceedings on the objection being taken before him. This he refused to do. The proceedings were then brought into this court by *certiorari*, when it was competent for the defendant to renew the objection before he traversed the inquisition. This he omitted to do, but made a formal traverse of the inquisition, and the issue thus formed was sent down to the circuit for trial. The judge having non-suited the relator, he applied for a new trial, upon the ground that the case was one that should have been submitted to the jury. When that motion was before us, we declined to entertain the objection as to the sufficiency of the complaint. My own opinion was that it was too late, after verdict; and that the omission might be cured by the verdict, if the facts appearing upon the trial made out such an interest in the relator as to bring him within the protection of the statute. I see no reason for recalling our decision, even if we did not feel bound to follow it, having once made it in this very case. This disposes of the appeal from the order of the court at Special Term, which should be affirmed, with ten dollars costs.

As to the motion for restitution, that, of course, will depend upon the relator's being able to sustain the verdict.

An objection is made that the verdict is not responsive to the issue. The inquisition finds that the defendant did *forcibly*, and with strong hand, *enter* into the said land and expel the relator therefrom; and being "*so expelled*" * * unlawfully and forcibly, and with a strong hand did keep out; and that the estate, and the right of possession of the said Jeremiah Cooper, as aforesaid, still subsists therein." The defendant traversed the inquisition, denying that he was "guilty of said supposed forcible entry and forcible holding out in manner and form as in the said inquisition alleged."

It has been repeatedly held, upon an indictment for forcible entry and detainer, that the petit jury may find the defendant guilty of either *forcible entry* or *forcible detainer*, as they may be two separate and distinct offenses.

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But when it is a *continuous* offense the rule may be more difficult to apply. And it has been held in some of the States, that under a complaint alleging forcible entry, *followed* by an allegation of forcible detainer, it is necessary to prove the forcible entry. (*Preston v. Kehoe*, 15 Cal. R., 315.) And it is said that the finding of the jury, in an action for *forcible entry and detainer*, that the defendant is guilty of withholding the possession, is not responsive to the complaint. (*Wall v. Goodenough*, 16 Ill. R., 415.)

The language of the inquisition would imply that the *forcible detainer* was a mere continuation of the first offence, but it is also added that the relator had a *present estate and interest* in the land at the time, which may be considered equivalent to the allegation that he was in the *constructive* possession, so as to bring his case within the terms of the statute, although the defendant's entry was peaceable instead of forcible. We may, perhaps, reject the alleged *forcible* entry as surplusage, and the verdict be permitted to stand, if it is sustained by the evidence. And I come to this conclusion the more readily as it was considered when the case was before us for the first time, that the question of a *forcible detainer* was the real question to be tried, there being no sufficient proof to sustain a verdict for a *forcible entry*.

We then come to the question, whether the verdict can be sustained upon the evidence.

The case is materially varied from what it was when we decided it before. It then appeared, or the evidence tended to show, and it might have been found by the jury, that the shop of the relator stood upon land belonging to the State. It did not appear what the particular estate of the relator was, but it was considered that his naked *prior* possession of the land in dispute was *prima facie* evidence of title and sufficient to maintain these proceedings *against a stranger who showed no right to possession*. It was not held that these proceedings could be employed to recover possession of a shop as personal property, as supposed by the defendant's counsel. But having possession of the shop, it was to be presumed that

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he owned the ground on which it stood, *as against a stranger without title*. This was all that it was necessary to decide, and all that was decided, according to my understanding of the case. The language of Justice MULLIN is emphatic, that a person without right, having gotten into possession of land, may be treated as a *trespasser* as to the owner of the land, and yet be restored to possession by virtue of these proceedings as against a third person having no interest in or right to possession. And that the restoration to possession cannot be had by an intruder as against the lawful owner. (See his opinion, 52 Barb., 211.)

As the building was, or at least, the evidence would have justified a finding that it was, on the land of the State without objection from any one, the possession of the relator was deemed lawful and sufficient evidence of title to sustain these proceedings against the defendant, who, at the time of the nonsuit, had showed no right to question the relator's possession.

I fully concurred in these views of the learned justice who delivered the opinion on that occasion. It is unnecessary to pause now to cite authorities to sustain the decision we then made, and I will only refer to some of them.

It may be said that any possession is a *legal* possession as against a wrong-doer. (2 Greenl. Ev., 618.) Thus an intruder upon the king's possession may have an action against a stranger (*Johnson v. Barret*, Aleyn's R., 10); and, *a fortiori*, he may have an action for forcible and unlawful entry against him (Moncure J. in *Olinger v. Shepherd*, 12 Gratt., 472); for forcible entry and detainer may be maintained when trespass cannot (*Hyatt v. Wood*, 4 John, R. 150.)

One question before us now is, whether the defendant could give evidence to contradict the relator's *prior* possession, and whether the evidence thus given and offered, but rejected, taken together, disproved the plaintiff's interest in the premises, which his prior occupancy of the shop would have established, as against a stranger, to the title.

The statute (2 R. S., 509, § 11), declares that it shall be

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sufficient, on the trial of such traverse, for the complainant to show, "in addition to such forcible entry or detainer, that he was peaceably in *actual possession* at the time of the forcible entry, or was in the *constructive* possession of the premises at the time of the forcible holding out." And the traverser may show in defence, that he, or his ancestors, or those whose interest in such premises he claims, have quietly possessed the same for three years next before the inquisition found (id). This provision, as to the defence which may be interposed, has but little if anything to do with the question. The intention of it is obviously to protect the possession of an adverse claimant, without title, who has been in the exclusive and quiet possession for three years, under claim (or color of title. After three years peaceable adverse possession, the owner cannot proceed under the statute to remove him, although his original entry was wrongful. In other words, it is a statute of limitations, and cannot be invoked to aid the complainant, if he fails to establish such a possession in himself, as to bring him within the terms of the statute.

It is a general rule, well established in the law of evidence, that the defendant may disprove what the plaintiff is required to prove, to establish his claim. This right is not affected by the provision in question. Now, while peaceable possession, in these proceedings, is *prima facie* evidence of an estate sufficient to support the complaint, the defendant may contradict the facts by which the relator attempts to show a title in himself; or, to use the language of SPENCER, J., in the *People v. Nelson* (13 J. R., 344), he may contradict the facts by which the relator attempts to make out his *estate*, and may show that he has not such an estate as would enable him to maintain the prosecution.

But the defendant having obtained possession without force, the question is, whether the relator had *constructive* possession at the time of the alleged forcible detainer, and doubtless the burden is on him to establish it; and it is certainly competent for the defendant to contradict the facts upon which the relator relies to establish it. Take the case

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of a servant in the occupation of the owner's land; it may be shown in these proceedings, that his possession is that of his employer, and that the complainant, although occupying the owner's land, has no interest or possession whatever to entitle him to institute these proceedings.

This brings us to the real question, and that is, whether the relator had such an interest or possession, as to entitle him to maintain a prosecution against the defendant for a *forcible detainer* of the land on which his shop stood before it was removed by the defendant.

The *locus in quo* was occupied by a shop and platform hay-scales; and, as was offered to be proved, was parcel of 200 acres, granted to one Sands Higginsbotham by the State in May, 1827. Afterward, in 1860, Higginsbotham conveyed certain portions of it, including the premises in question, to Nathan B. Wilbur and others, and their successors, and survivors, *in trust*, to sell and convey to whoever would in their judgment, erect suitable substantial brick buildings, solely for business purposes for the beneficial growth of the village of Oneida. In October, 1861, the trustees contracted to sell to the defendant (Nehemiah Fields) a parcel of said lands, lying and being south of Phelps street, and on the east side of Main street, being lot number one, "being twenty-five feet in width on Main street, the same width in rear, and extending in depth from Main street to the feeder;" the defendant agreeing on his part, "to erect, and inclose upon said lot number one, with a suitable brick building." These conveyances were rejected by the judge at the circuit, but they have been copied into the case, and the object of offering them was, to show that the *locus in quo* was actually included in the land bought by Higginsbotham from the State, and sold by the trustees to the defendant; and of course could be no part of the State land. Assuming, as I think we must, that the evidence excluded would have shown this, it effectually disposes of the principal fact relied upon to sustain the prosecution, and upon which the decision of this court mainly rested when the case was here before.

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Without doubt, it was competent for the defendant to show that his contract included the *locus in quo*, and that he entered into actual possession of part, claiming the whole. The defendant occupies the same position as Higginsbotham would occupy if he had retained the title; and if the relator had no interest in the land as against the owner when he was held out by force, he could not have *constructive* possession within the meaning of the statute.

The case shows that, while Higginsbotham was in possession, and before he gave his trust deed, the shop, which was then owned by one Fish, was moved on to the spot it occupied when it was moved off by the defendant; that Fish got permission of Higginsbotham to move it there, with an understanding that it was to be moved off again whenever Higginsbotham required it; and that there was no agreement between them that Fish should pay rent or other compensation for the privilege of having his shop stand there. He also got permission of Higginsbotham to put down a platform for hay-scales, in front of the shop. He continued to occupy the shop and hay-scales, without any new agreement, until the defendant purchased the lot, on part of which they stood, for the purpose of erecting a block of buildings. The lot, as we have seen, was called number one, was uninclosed, and the shop and hay-scales occupied only a portion of it. When the defendant purchased the lot, he notified Fish of his purchase and of his intention to take possession of the whole of it, for the purpose of erecting a block of buildings, as he had agreed to do by his contract. The defendant proposed to prove that Fish, when told of this, stated to the defendant that he made no claims there, and that he would move the shop off, and upon this that Field went to work excavating, to put up his block. This evidence was excluded, to which there was an exception. The defendant also offered to prove that Field claimed the right to go into possession under Higginsbotham, and that Fish consented that he might excavate, and agreed to move off the building when they got up to

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where the building was. This evidence was excluded, to which there was also an exception. It was then proved that Field did, in fact, commence excavating for his block, that he excavated up to the hay-scales, that Fish moved the hay-scales, and then the excavation went on up to the shop, as close as they could get; that Fish made preparations to remove his shop, and actually employed men to do it before he sold it to the relator; that when he sold the shop to the relator, he told him that he had made a bargain to move it off, the hay-scales being already moved off; and that he had made a contract to move off the shop.

The fact that Fish was going to put a block on the lot was a fact of general notoriety.

The complaint calls for twenty-six by twenty-eight feet of ground. The shop was twenty-eight by sixteen feet, and, of course, the *locus in quo* included the ground on which the hay-scales stood. The case shows that Fish occupied the building as a harness shop, and sold it to the relator on the 1st of January, 1863, but still retained possession by an arrangement with the relator, until the 10th or 12th of April following, when he delivered the key to the relator, leaving some few articles of personal property in the shop. The relator locked it up, and carried the key to his house, several miles distant. After that the relator went to the village several times, unlocked the shop, and examined it; talked of turning it round on the street, and proposed to rent it for a meat shop. There were several interviews between the relator and the defendant, in which the defendant offered to the relator to buy the shop, the relator then claiming that he had a right to occupy the premises. This claim was upon the ground, as I understand it, that it was State land. Failing to effect any arrangement with the relator, the defendant proceeded, in his absence, to remove it from the lot into the public highway. The relator, the same day, appeared and demanded re-possession of the premises, when he was kept out *by force*, according to the verdict of the jury. Without disputing the fact that force was employed to retain possession

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by the defendant, I am clearly of opinion that, under the circumstances disclosed in the evidence, the verdict cannot be sustained.

The relator, being out of possession at the time of the alleged forcible detainer, was required by statute to show that he had, at least, the *constructive* possession. And as against a stranger to the title, we have seen that his prior occupation would be evidence of his right and sufficient to support the verdict; but as against the owner, entitled to the possession, it is clear that the relator would have no interest or estate in the premises.

But before proceeding to define the actual relation subsisting between these parties, there are several incidental questions which I propose to discuss.

It is said that Fish, and afterward the relator, was, at least, a tenant at will. Perhaps this is true, as such a tenancy was known at common law. But as there was never any conventional relation between Fish and Higginsbotham, or between the relator and the defendant, of landlord and tenant, neither of them was entitled to notice to quit. (*Benjamin v. Benjamin*, 5 N. Y., 383; *People v. Annis*, 45 Barb., 304.) A tenancy strictly at will, at common law, may be terminated at any time, either by an express declaration to that effect, or by any act of ownership inconsistent with the tenancy. The tenancy terminates immediately, and the only question of doubt is whether the tenant might enter afterward to remove his goods, without being a trespasser. (*Doe v. McKaeg*, 10 B. & C., 721; 1 Hilliard on Real Property, 279.) In the case of a lease, *strictly at will*, it has been held that an entry by the landlord, and notice to quit given to the tenant, will terminate the lease, revest possession in the landlord, though the tenant be not actually turned out. (*Curl v. Lowell*, 19 Pick., 25.) It is submitted that if there was any tenancy between Higginsbotham and Fish, it was strictly a tenancy at will at common law, and gave Fish no estate or right of possession which he could transfer to the relator; and that it was terminated by the very act of transfer under color of which

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the relator claims an interest in the premises. It is a well established rule that such a tenant cannot assign, though he may take a release. (Hilliard, 278.) And it is said that one placed on the land without any terms prescribed or rent received, is strictly a tenant at will. (Id.)

In my opinion no such *tenancy* is recognized by the Revised Statutes. Ample provisions are made for terminating tenancies, and giving to the landlord a summary remedy to recover possession after such determination. These are tenancies for years, at will and at sufferance, and we have seen that they can only arise where there has been a conventional relation of landlord and tenant between the parties. The relator certainly is in no better position than he would be if he had entered under a lease and held over after the termination of his estate by a notice to quit. The landlord may afterward lawfully re-enter or maintain ejectment, or proceed in the manner prescribed by law to remove such tenant. (1 R. S., 745, § 9.)

This is clearly declaratory of the rights of the owner at common law to re-possess himself of his property wrongfully withheld, if he can do so without a breach of the peace. The language of the statute is, that he "*may re-enter or maintain ejectment, or proceed in the manner prescribed by law, to remove such tenant.*"

It is therefore clear upon this statute, that the right of *re-entry*, without suit, is reserved to the owners of real estate, as against tenants whose rights have been determined by notice, or in any other mode made known to the law.

That such a right existed at common law is beyond question, and it has been repeatedly recognized by the decisions of our own courts.

Every man, having a right of entry into lands, may assert the right, provided he commits no such acts of violence as will subject him to a criminal prosecution. (*Langdon v. Potter*, 3 Mass., 215.) And it was said by SPENCER, J., in *Hyatt v. Wood* (4 John. R., 158), that in respect to real property, a person having a right of entry may, under the statute, enter peaceably upon one who is in possession without right by the

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terms of the statute; but if the entry had been by breach of the peace, the defendant, it seems, might be indicted, but it would not render him a trespasser. (SAVAGE, J., in *Orser v. Storms*, 9 Cow. R., 687.) And this is clearly the rule to be deduced from the provisions of the Revised Statutes, which provide that "no entry shall be made into any lands or other possessions but in cases where entry is given by law, and in such case in a peaceable manner, not with *strong hand* or *multitude of people*." This provision is a full recognition of the common law right of the owner to re-enter as against a person in possession without right, if he can do so without force. In *Livingston v. Tanner* (14 N. Y., 64), a tenant for life continued in possession without the consent of the owner after the determination of his estate, and it was held that he was not entitled to notice to quit; and *per* JOHNSON, J.: "In such a case the owner could always enter and dispossess the occupant, or maintain ejectment without notice, and could do so still" (p. 70). He may re-enter without force, but not with such force as to make him liable to an action for forcible entry. (*Newton v. Harland*, 1 Mann & Gr., 644; 4 Kent, Const. Ed. 130, Note.)

It is obvious, however, that the prosecutor must have gotten into possession under *some claim of right*, either as tenant or purchaser, to entitle him to the protection of the statute. Although the tenancy has expired, or the contract of purchase has been forfeited, the prosecutor, until he has been expelled by lawful proceedings, may claim to be in possession, seized of his original estate. And it has been held that all entries by the owner upon the lands in possession of a *tenant*, whose *tenancy has expired*, by such force as to subject him to an action for a forcible entry, are *unlawful*, within the meaning of the statute; and that the owner himself may by these proceedings be required to restore what he has thus acquired by force and violence. In such a case he may be found guilty of either forcible entry or detainer, although the two offenses are one and the same, as the forcible detainer will depend upon the question, whether there has been in

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fact a forcible entry. When, however, the prosecutor *never was in as tenant or purchaser*, but by the *mere license* of the owner, it is clear, as I shall presently show, that his occupation does not draw to itself any estate or interest which the law recognizes as entitling him to restoration. If so, any trespasser might defy the owner, when required to relinquish his occupation.

As to what constitutes a *forcible detainer*, the authorities are not agreed. It is said that if a tenant for years after his term had expired, hold by force against the lessor, it is a forcible detainer. (Cro. Jac., 199.) So a mortgagor, after forfeiture, might be guilty of forcible detainer, by maintaining possession by force. (3 Chit. C. L., 1121.) But under our statutes the relations of the parties are changed, so that the prosecution could not be maintained until after foreclosure. Perhaps the correct rule is stated in 1 Bishop's Cr. L., § 397. The author says: "A man may use all reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, *yet if he undertakes to retain what he knows to be a wrongful possession by such force and numbers, as necessarily to excite terror, he is indictable.* This offense is called in law a *forcible detainer.*" Wharton says that this offense occurs, when a man takes or *keeps* possession of the lands or tenements *of another* by force, &c. (Wharton's C. L., § 2013.) And he says that a person who has a right, may enter and then maintain the proceedings against one *unlawfully* in possession. (§ 2037.) And it was held in *Mugford v. Richardson* (6 Allen R., 76), that after the tenancy has been terminated by notice, the owner having gained peaceable possession of a portion of the premises, might use as much force as may be necessary to overcome the tenant's resistance to his taking possession of the residue. And in the absence of the occupant, the owner having the right to the possession, may enter by forcing open the door, though the occupant expects to return. (*Mussey v. Scott*, 32 Vt., 82; *S. P. Turner v. Meymott*, 1 Bing., 158; *State v. Pridgen*, 8 Ired., 84.)

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In the form of indictment for a forcible *detainer*, it may be stated that the entry was *unlawful* and the *detainer* forcible (2 Bishop on C. Procedure, § 335); and it was held in the *State v. Johnson* (1 Dev. and Batt., 324), that neither by common law nor by statute can an indictment be maintained, when the entry is both peaceful and lawful; and that to authorize proceedings under the English statutes for a *forcible detainer*, the entry must be an *unlawful* entry, followed by a *forcible detainer*.

In some few cases, judges have advanced the doctrine that any entry, even by the person entitled to the possession, is unlawful, if made against the will of the party in possession. Such a view of the statute is clearly contrary to the decisions of our own courts and to the policy of the law. (See 1 Wash., on Real Estate, 540, 541.) Our statutes do not interfere with the common law right of justifying, in an action of trespass, *quare clausum fregit*, even a forcible entry (*Jackson v. Farmer*, 9 W. R., 201; *Hyatt v. Wood*, 4 John. R., 150; *Ives v. Ives*, 13 John. R., 235.)

There was never any doubt of the right of the owner to re-possess himself of his lands, if he found them vacant; and it seems to be well established, that leaving personal property on the lands does not preserve the possession (3 Bacon Ab., Forcible Entry (B); 2 Bishop on Cr. L., § 421); and it has been held that the mere act of nailing up the doors of a house does not amount to retaining possession. Such an act may show an intention that others should not possess, but it cannot be construed to be a continual possession (*Hopkins v. Buck*, 3 A. K. Marsh., 110.) But when the family or servants of the tenant are left in possession of a residence upon the lands, it seems that the owner cannot, after gaining possession without opposition, forcibly expel them. The subsequent force, by relation, is considered as a part of the original force, and the owner may be proceeded against for a forcible entry and detainer, although this was gravely questioned by some of the judges in *Newton v. Harland* (1 Mann. and G., 644). It is, however, quite clear, that leaving

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a shop on the premises, which is the personal property of the tenant, is not to be regarded as the retention of the possession of the lands on which it stands. Thus, in *Field v. Higgins* (35 Maine R., 339), in a proceeding for a forcible entry and detainer, to recover a building standing upon the land of the owner, by his consent, it was held that the action could not be sustained, although the complaint claimed the premises as well as the building.

In fact, the authorities show that the relator himself might have been proceeded against for a *forcible detainer*, if he had attempted to retain his possession by force. Having the title and the right of possession, and having taken possession of a portion of the lot, the defendant must be deemed *in constructive possession* of the whole. And the relator, having gone into the shop with a claim to occupy the land, could be proceeded against by the owner for an unlawful detainer. (*Benedict v. Hart*, 1 Cush., 487.) The *constructive possession* follows the legal title, or title deeds, and does not attach to one who is out of possession, and without title. When there is no *adverse holding*, the possession follows the property in the land, and is in him who has the title. (3 Wash., 118.)

Doubtless a man without right, may enter upon the owner's land and gain a title by *disseizin* in certain cases; but to give such entry effect, as an adverse possession, it must be yielded to without opposition by the real owner. When, therefore, the owner protests against the acts of possession by the other party, they are unavailing. (3 Wash., 141 and 142.) And a mere possession, without a claim of right, gives no title, however long the same may be continued (*Id.*, 141); that is, as against one who disturbs him in his possession, although he could not defend against the owner. (*Id.*, 132.) As to him, the true owner may enter at any time upon such an occupation. (*La Frombois v. Jackson*, 8 Cow. R., 603, JONES, Chancellor.)

But in my opinion, the relator upon the facts disclosed on the trial, and offered in evidence, had no *interest* or *right to possession*, which would entitle him to maintain this prosecu-

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tion against the defendant, either for a forcible entry or detainer. Prior to the Revised Statutes the relator, to entitle him to this remedy, was required to show that he had an estate in the premises, for at least a term of years. Now he must have an estate of freehold, or for a term of years, or *some other right to the possession*. And the complaint must state that right. (2 R. S., 508, § 3.) It was not intended therefore, to include a person who happened to get into the possession of the owner's land without any right to it. A person in possession as a tenant at will, or sufferance, has an estate or interest in the land; and although he occupies beyond his term and holds on, is deemed to be in possession of the estate, or interest of which he was originally seized. By our statutes, such a tenant may be turned out of possession by summary proceedings after the expiration of the statutory notice. And if he attempts afterward to hold possession by force, the authorities are to the effect, that the landlord may proceed against him for a *forcible detainer*.

But the statute evidently contemplates, that the possession of the complainant should be founded upon *some right or interest* in the land to entitle him to its protection, and the complaint would be fatally defective if he merely alleged possession, without claiming a right to it.

We have already seen that a naked possession, without a claim of right, is nothing but an occupation, upon which the owner may enter at any distance of time; for he does no wrong to the occupant, who claims no interest in the land. (8 Cow. R., 603.) The complainant, if he has any right to the possession, has, doubtless, an *estate*, which is the appropriate legal signification to denote the *particular right* he has in the land. (Hilliard on Real Estate, 47.) That neither Fish nor the relator had any interest or estate in the land, is too obvious to require the citation of authorities. Fish's shop occupied this land by the *license* of the owner, which is a mere authority to enter upon the land, and do an act, or series of acts, without having any interest in the land, founded in personal confidence, and not assignable, and

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amounts to nothing more than an excuse for the act, which would otherwise be a trespass. (1 Hilliard, 235, note (b); 1 Wash., 542.) It does not extend to any one but the licensee. The death of either party will revoke it, and so would a transfer or alienation of the interest of the licensor. (Id., 545.) A parol license to enter upon another's premises to cut a drain, to construct a culvert, to flow the land, or to erect and maintain a house, is revocable, and confers no right whatever upon the licensee to occupy the premises after it is revoked. (Id., 546, 7.) Thus, in *Harris v. Gillingham* (6 N. H. Rep., 9), A, with the permission of B, erected a house on B's land, and then conveyed the house to C, but continued to reside in it. B conveyed the land on which the house stood to D, who requested A to leave the house, and, upon A's refusal, entered and tore down the chimneys, and put it in such a situation that A could not reside in it; and it was held that A could not maintain an action for breaking and entering upon him. So when the church parish permitted some of the parishioners to build sheds on the land owned by the parish, and occupy them, it was held that they might be torn down by the parish, without being responsible to the owners of the sheds. (*Bachelder v. Wakefield*, 8 Cush., 243.) In *Jackson v. Babcock* (4 J. R., 418), it was held that a written license by the owner to another to build upon and occupy his lands, was revocable, and gave to the licensee a mere license, or personal privilege to inhabit, and conferred no title to the possession. Such a license of the owner of the land to another, to erect a house on such land, for his use, operates only as an excuse for the act, and passes no interest in the land. (*Prince v. Case*, 10 Conn., 375.) It is not an easement. (*Bachelder v. Wakefield*, *supra*.) In *Haywood v. Miller* (3 Hill, 90), the plaintiff entered into possession of a house upon the defendant's premises, under a contract to work the defendant's land for a year, and it was held that it created no tenancy; and the defendant having entered the house, and put the plaintiff's furniture out, the plaintiff sued him in trespass, and failed to recover. The *possession* of the

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plaintiff, in such a case, is the possession of the owner, and has been so held, repeatedly, by this court. (And see *Putnam v. Wise*, 1 Hill R., 248; *People v. Annes*, 45 Barb., 804.)

Fish having put his shop on the lot by the mere license of the owner, such license did not create a tenancy known to our laws; but the law applicable to *licenses* must be applied to his occupation. It seems unnecessary to say that *time* is of no importance in determining the rights of the parties. It would hardly be contended that a license to occupy for a day, or temporarily, would confer any right on the licensee to continue in possession. Any trespass committed upon the land thus occupied could be brought in the name of the owner. (*Putnam v. Wise, supra.*)

The rights of the parties are not changed because the license is continued for a week, a month, or for years. This is emphatically so when the licensee does not live upon the premises. When he has a residence upon another's land, the courts have showed a disposition to protect him against a *forcible entry* by various and contradictory theories of the law; but no case can be found where such protection has been extended to other erections, which are personal property. The contrary was expressly decided in *Dyer v. Chick* (52 Maine, 350).

I therefore come to the conclusion that Fish never had possession of the land upon which his shop stood, as against the owner, and could not maintain the proceeding against the defendant for forcibly removing the shop into the highway. And it is entirely clear upon the authorities, that he had no possession which he could transfer to the relator by a sale of the shop and which transfer of itself worked a revocation of the license; and the entry of the relator afterward was a trespass upon the possession of the defendant. He was a mere intruder, and of course had neither title nor possession to entitle him to maintain such a proceeding as this against the owner of the land.

The owner, not having parted with the title or possession,

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had a right to use all necessary and reasonable force against the relator, who attempted to dispossess him without right. (1 Bish. Cr. L., § 397; *Harrington v. People*, 6 Barb., 607; *The State v. Godsey*, 13 Ired., 348.)

If I have not mistaken the purport of the authorities, the relator must fail to sustain this proceeding upon several grounds.

(1.) If Fish was ever in possession, with such an interest as to entitle him to the protection of the statute, he voluntarily yielded it up to the defendant, when he allowed him to enter upon a part of the premises, with claim of title to the whole. (*Mugford v. Richardson*, 6 Allen, 76; and see *McDougall v. Sitcher*, 1 John. R., 42.)

(2.) But Fish having occupied the *locus in quo*, by the mere license of the owner, was never in possession as against the owner; but, if he was, he could not transfer any interest or right to possession to the relator; for, by the very act of transfer, his right, whatever it was, was terminated.

(3.) The relator, in order to sustain the verdict, must show that he had, at least, a *constructive* possession; and this, we have seen, he could not establish, as against the owner, who had been permitted by Fish to enter into a part of the lands before the relator purchased the shop.

In any aspect of the case, I regard the relator as a mere intruder upon the possession of the defendant, and, in my opinion, he has no more right to maintain this proceeding than any other trespasser who should intrude himself upon the premises.

The motion for a new trial should be granted, with costs to abide the event, and the motion for restitution denied without costs.

BACON and FOSTER, JJ., concurring.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK on the relation of WILLIS H. ADSEY, HAMILTON N. TOWNER AND ARTEMUS H. WHITNEY, Commissioners for the Improvement of the Boquet river, v. WILLIAM F. ALLEN, Comptroller of the State of New York.

(GENERAL TERM, THIRD DISTRICT, SEPTEMBER, 1869.)

The legislature having passed a law by a majority vote, appropriating money for the purpose of removing obstructions from, and improving the navigation of, the navigable portion of the Boquet river; a river flowing into Lake Champlain, and navigable therefrom for three miles, for boats of light burden, used in the transportation of coal, iron and other commodities.—*Held*, the appropriation was neither for local nor private purposes, and the law was constitutionally enacted and valid. PECKHAM, J. dissenting.

It seems, when there may be doubt, as to whether an appropriation is or is not for local or private purposes, and it is not made to appear that, in point of fact, it is for one or the other of such purposes, the presumption will be in favor of the constitutionality of the legislative proceedings. Per HOGEBOM, J.

In the application of the clause of the constitution, which makes a two-third vote of the legislature requisite for the passage of bills, "appropriating the public moneys or property, for local or private purposes;" where an improvement ordered is clearly of a local character, the judicial department may pronounce it unconstitutional; but where the question is one of degree or extent, and not of the legal effect of a palpable fact, it falls within the domain of the legislature. *Id*.

The practice of the legislature, with reference to various acts making appropriations of money for purposes similar to the act in question, pointed out; and the meaning of the terms "local" and "private" commented upon and explained. *Id*.

Held, further, a mandamus would lie against the comptroller, to compel payment of the moneys appropriated, on his refusal to pay the same.

THIS case was submitted to the court under the provisions of § 372 of the Code of Procedure, upon the following facts:

The legislature, at the session of 1869, passed, by a majority vote, the question being taken by ayes and nays, and duly entered on the journals, three-fifths of all the members elected to either house being present, an act, of which the following is a copy:

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An Act for the improvement of the navigation of the
Boquet river.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The sum of two thousand five hundred dollars for each year, of the years eighteen hundred and sixty-nine, and eighteen hundred and seventy, is hereby appropriated out of the moneys in the treasury belonging to the general fund, not otherwise appropriated, for the purpose of removing obstructions and improving the navigation of Boquet river, from its mouth to Willsborough falls, which sum of money shall be expended by and under the direction of Willis H. Adsit, of Willsborough, Hamilton N. Towner and Artemus H. Whitney, of Essex, in the county of Essex, commissioners hereby appointed for that purpose.

§ 2. The said commissioners, before entering upon the duties of their office, shall execute and file in the office of the comptroller a bond, to the people of this State, with sufficient sureties, to be approved of by the comptroller, in the penal sum of ten thousand dollars, for the faithful performance of their duties.

§ 3. The aforesaid commissioners shall receive two dollars per day for each day actually employed in the duties of said office, out of the money hereby appropriated, and shall annually report their proceedings on or before the first day of December in each year, verified by their oath to the comptroller.

§ 4. The comptroller shall have power to fill vacancies that may occur in said board of commissioners.

§ 5. This act shall take effect immediately.

This act was certified by the president of the senate and the speaker of the assembly, and signed by the governor, but did not receive the assent of two-thirds of the members elected to each branch of the legislature.

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The relators were the commissioners named in said act.

They had filed their bond in the form and with sureties as prescribed in said act, which bond had been approved by, and filed with the comptroller.

The relators had duly demanded of the defendant, as comptroller, the sum of \$2,500 for the purposes specified in the first section of said act. The Boquet river empties into Lake Champlain, in Essex county. It is and has been from the earliest settlement of the county, navigable for boats of light burden, used in the transportation of coal, iron and other commodities, from its mouth to Willsborough falls, a distance of not more than three miles.

The defendant, as comptroller, had refused to pay said amount, upon the ground that the appropriation was for "local or private" purposes, and that therefore the bill should have been passed by a two-thirds vote under the provisions of section 9, of article 1, of the constitution.

The relators claimed that the appropriation was not for a private or local purpose, and that the 9th section of article 1, of the constitution did not apply, and they asked for a peremptory mandamus against the defendant, requiring him to pay the said sum of \$2,500; and the comptroller denied the rights of the said relators to such relief, or to any relief.

Upon these facts the question at issue upon the application of the relators was submitted for adjudication by the court, under the provisions of the Code before mentioned.

Matthew Hale, for the relators.

Amasa J. Parker, for the defendant.

Present—INGALLS, HOGEBROOM and PECKHAM, JJ.

By the Court—HOGEBROOM, J. The act in question, which appropriates \$5,000 out of the general fund, for the purpose of removing obstructions and improving the navigation of Boquet river, from its mouth to Willsborough falls, under the direction of commissioners, is assailed on the ground of its

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unconstitutionality, as being a bill appropriating the public money or property for local or private purposes, and therefore requiring the assent of two-thirds of the members elected to each branch of the legislature, which it did not receive.

I think the appropriation was not for local or private purposes, and I will proceed to state my reasons for such conclusions.

1. It was not pretended that the purpose is *private*, personal or individual, because the appropriation is for the benefit of all those who choose or have occasion to navigate the Boquet river or Lake Champlain. The way is open to all, and no one is precluded from availing himself of the privilege. It is for the benefit and use of the public and the whole community.

2. Nor can it, in my opinion, be said to be for a *local* purpose. A local purpose would seem to be one, the benefit of which is confined to a particular locality or limited district. A local purpose has reference to the citizens or interests of a particular locality, and not to a large or extensive district, or to the community in general.

3. I do not see how, in this sense, or in any appropriate sense of the word *local*, the appropriation can be said to be for a local purpose. It is for improving the navigation of, and removing obstructions in a navigable river, and therefore a *public* river, in which the public have important rights and interests, over and above those of the riparian owners, emptying into Lake Champlain. Of course, it will be open and accessible to all such vessels as sail on the lake and can navigate its waters, and to all persons who do business on the lake. If the appropriation were for the improvement of the navigation of the lake, which we may take judicial notice, perhaps, is largely employed for interstate and international commerce, no one would claim that it was for a local or private purpose. Is it less so, where it is to improve the navigation of a tributary or inlet of the lake, communicating directly with the great body of the water of the lake and capable of transporting on its waters "coal, iron and

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other commodities," such as are usually carried on the lake itself?

4. The improvement cannot be said to be for a "local purpose" simply because it is made, as it necessarily must be, in a particular or limited locality. All the improvements on the Hudson river would, if that were so, be subject to the same condemnation. It is not the place where the improvement is made, that is to confer upon it a local character or otherwise, but the purpose for which it is made. An improvement upon the State capitol at Albany, though located in and confined to Albany, would not be for a local purpose. An improvement deepening the channel of the Hudson river at Castleton, and removing any obstructions therefrom, would not be a local improvement or for a local purpose, because it would be for the general benefit of all craft of every description and of every nation navigating the Hudson river. An improvement upon Lake Champlain, at Plattsburgh or Port Kent, being ports upon the lake, for the purpose of improving the navigation or removing obstructions, could not be condemned as a mere local improvement, because the effect would be to facilitate and increase the commerce of the whole lake, and thereby promote the general interests of the public. Nor, in my opinion, can the improvement of the navigation of the Boquet river at Willsborough falls and from that point, a distance of three miles to the lake, be adjudged a merely local improvement. It facilitates and enlarges to that extent the area of navigation. It in effect extends and increases by so much the banks of the lake. It may furnish desirable harbors for vessels upon the lake. There is nothing to show that it may not open in this way convenient and desirable communication to a back country, and access to mineral and other products not otherwise readily reached. Evidence of this fact may have been furnished to the legislature, and the presumption, I think, is in favor of the constitutionality of these proceedings. The comptroller undertakes to condemn the act and refuse obedience to its requirements by the matter appearing on the face of the bill.

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I think he has no right to do so, on the state of facts there appearing, without clear evidence on the face of the bill of its unconstitutionality, and this the act it seems to me is very far from showing. If it were thus apparently unconstitutional, and the comptroller apparently justified in refusing to obey the mandate of the legislature, the reason is removed when we come to know the facts, to wit: That the Boquet river is a navigable river, used in the transportation of coal, iron and other commodities from its mouth on Lake Champlain, to Willsborough falls. If we couple this with the presumption, as I think we must (except where there is affirmative evidence to the contrary), that the legislature acted upon sufficient evidence or authentic information of the non-local character of the improvement, there seems no reason why the comptroller should not now be required to give effect to the legislative will.

5. The foregoing observations lead to another view of the case already partially considered, that the improvement must not be pronounced a local one or made for local purposes, simply because it is upon a mere tributary of the lake. As before stated, it enlarges the borders or area of the lake; it increases its navigation; it promotes its commerce. The Erie canal would, I suppose, be regarded not only (as it plainly is) State property, but an improvement upon it as a State improvement made for the general benefit of the whole community. Would it be any the less so if made upon a tributary or feeder of the canal, if the object, and intent, and actual effect were to improve the navigation of the canal, or supply the needed quantity of water for its convenient and successful navigation. This improvement is, in effect, upon an inlet or feeder of the lake, supplying it with harbors, with tonnage, increasing the facilities, and enlarging the area of navigation. The river being navigable, the State has an interest and a property in the navigable waters, and in expending money, in a certain sense, and I think in a real sense, upon its own property. (*People v. Canal Appraisers*, 33 N. Y., 461; *Morgan v. King*, 35 N. Y., 454.)

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6. Nor can the improvement be pronounced a merely local one, because its apparent benefits may not be so great or extensive as if prosecuted in some other localities. That is a matter for the judgment of the legislature. There must be a difference, in this respect, between one improvement and another. No two are exactly alike; all improvements cannot be concentrated upon a particular locality. The places where they are to be made, the extent of benefit which they are to confer, the precise character of that benefit must be left to the sound discretion and enlightened judgment of the legislature itself, elected for the very purpose of determining these questions, in all cases where the character of the improvement places it beyond the pale of a merely local purpose.

7. This leads to the remark, that on all these questions much is intended to be, and necessarily must be, left to the judgment of the legislature. Where the improvement ordered has certain ear-marks, giving it clearly a local character, I agree that the judicial department of the government, as the proper organ for the exposition of the law, may pronounce it unconstitutional. But where its local or general character depends upon a question, more or less nicely balanced, of the degree of navigability of the stream or body of water proposed to be improved, of the extent of navigation upon it, of the extent of the commerce already transacted upon its waters, or of the enlargements or additions to it, which may be rationally expected to flow from the consummation of the proposed improvement; in short, where it is a question of degree or extent, and not of the legal effect of a palpable fact, I think it falls within the domain of the legislative, and not of the judicial department of the government, and that it does not belong to an officer of the government, whose allocatur is essential to carry into effect the appropriation, to defy the mandate of the legislature; and where any of these questions depend upon considerations outside of the plain letter of the act itself, and if determined as questions of fact in a particular direction, will support the constitution-

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ality of the act, I think we must presume they were so decided by the legislature as to uphold rather than defeat the validity of the enactment.

8. Hence the practice of the legislature, in times past, in disposing of questions of this description, though not absolutely controlling, is very fit to be considered, and entitled to considerable weight. I will refer to some instances of this character.

The various acts for the improvement of the navigation of the Hudson river, and for removing obstructions therein, between Troy and New Baltimore, and Troy and Coxsackie, and one of them "at or near Castleton," were all treated as public and not local improvements, and passed by a three-fifths instead of a two-thirds vote. (See Laws of 1863, chap. 122; id., 1864, chap. 105; id., 1865, chap. 561; id., 1866, chap. 491; id., 1867, chap. 647; id., 1852, chap. 365.) Various other acts were passed in the same way for improving the navigation of and removing obstructions in certain rivers, creeks and the tributaries thereof, some of these of very inconsiderable note, and quite a number of them simply for facilitating the floating of logs and lumber, as, for example, the following:

For improving the Black River canal, and the Erie canal feeder.

In relation to the Oneida river improvement.

For the improvement of Racket river and the tributaries thereof.

| | | |
|---|---|--|
| " | " | of the channel of Piseco river outlet. |
| " | " | of the outlet of Owasco lake. |
| " | " | of West Canada creek and its branches. |
| " | " | of the Sacandaga river. |
| " | " | of the Saranac river. |
| " | " | of the Salmon river. |
| " | " | of the Beaver river. |

Many, or several, of these being merely for the floating of logs and lumber down rivers navigable for ordinary water

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craft. (See Laws of 1849, chap. 216 ; id., 1850, chaps. 249 and 693 ; id., 1851, chap. 492 ; id., 1852, chap. 193 ; id., 1853, chap. 452 ; id., 1854, chaps. 200, 162, 163 and 235.)

These references, which might be much multiplied, are sufficient to show what is and has been the sense of the legislature in regard to appropriations of this description.

It is undoubtedly true that several acts, which might probably have been valid under the three-fifths clause of the constitution, were (perhaps for greater caution) passed under the two-thirds clause. Such are some of the acts referred to by the learned counsel for the defendant ; and some are perhaps debatable upon the question to which class they belonged, such as the " Act to open and improve the road through the oil spring Indian reservation, in the counties of Cattaraugus and Allegany," in which the opinion of Attorney-General TALCOTT is quoted, and the act to which he refers in his opinion, viz. : " An act for completing the military road leading from Plattsburgh to the county of Franklin ;" but I think the large preponderance of the legislative action and interpretation is in favor of such a construction of this constitutional provision as would leave the present act untouched by any objection of that character.

There is, it must be admitted, considerable difficulty in defining the word *local* by a synonymous word, or by a phrase expressing its precise meaning. I agree that it was designed to express an idea somewhat different from that of *private*, and yet for some purposes the words are nearly synonymous. The words *general* or *common* will, it seems to me, express the opposite or converse idea to both those words. Both words are used for greater caution, and are doubtless somewhat different in meaning ; a private purpose referring more particularly to a purpose for the benefit of an individual or a limited number of men, and a local purpose to a purpose for the benefit of a particular place or limited locality. As I have said, the opposite of these is general or common, but not necessarily so general or so common as to be absolutely universal. It is a question of

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degree. To protect the appropriation from condemnation, under this clause of the constitution, the purpose must be in a certain sense public, but not necessarily for the universal benefit of the whole community, though I think the purpose of this bill can be said to be so when there is no restriction whatever to the enjoyment of the improvement. So it must be otherwise than merely local. Its benefits must not be confined to a particular locality, though I am unwilling to say that a particular locality may not, from surrounding circumstances and particularly proximity to the place where the improvement is made, enjoy these benefits to a larger degree than the general public. I am not quite prepared to adopt another construction which is contended for, to wit, that the test is whether the main or chief benefits will be enjoyed by a particular place or locality. On the contrary, I am inclined to think that, in order to bring the case within the prohibition of this clause of the constitution, the direct benefits flowing from the improvement must be exclusively local. If they are to a substantial or appreciable extent general and public, this quality puts it within the power of the legislature to pass the bill on these grounds, and hence to divest it of the objection of being a merely local bill; and I think in such case we must presume that the legislature looked at this general or local feature of the bill in enacting it, for we are to presume in favor of and not against the constitutionality of a measure which has received the sanction of the legislature; that is, if any view of it would be possible to make it constitutional consistently with the apparent purpose and tenor of the bill, we are to suppose the legislature adopted that view.

Again, as local does not necessarily mean limited to a spot of the smallest possible dimensions, and non-local or general does not necessarily mean universal space or space limited only by the exterior boundaries of the State, who is to judge when a bill comes up for action or for decision whether it is local or not? If palpably local, the courts may doubtless condemn it, but if general or for the general benefit in a

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reasonably extended sense, should it not be left to the sound sense and ripe judgment of the legislature to determine as to the degree in which a bill must be freed from the objection of being for a local purpose. At least, I think its unconstitutionality should be clear and apparent before it is condemned by the courts.

I think there is no force in the suggestion that the remedy by mandamus is not proper. It is, I think, the one usually resorted to, and perhaps no other is available. Here is a fund to which the relators have a clear legal right; one department of the government (the legislative) has so declared; another (the judicial) concurs in the same view; and I think the comptroller, who for this purpose is the disbursing officer of the government funds, has no right to refuse payment, and if he does refuse, should be compelled by mandamus to perform his duty.

I think a peremptory mandamus should issue against the defendant requiring him to pay the \$2,500 demanded.

INGALLS, J., concurred.

PECKHAM, J., read a dissenting opinion.

Motion granted.

PATRICK PHELAN and STEPHEN SHANAHAN, Respondents, v.
THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY,
Appellant.

(GENERAL TERM, THIRD DISTRICT, SEPTEMBER, 1869.)

A contract with a railroad company for the performance of labor, &c., upon its road, in the construction thereof, by which the contractor agrees to abide by the opinion of an engineer in such company's employ, as to the adequacy of his labors to accomplish the contract work within a specified time, and upon notice from such engineer, that he will make the exertions and arrangements, necessary in the latter's opinion, to compensate for previous neglect and to insure fulfillment, as stipulated; and for failure so to do that the contract shall, at the option of the company,

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be at an end, and that he will be liable for damages or expenses incurred on account of his neglect, and will surrender possession of the road &c. ; and, also, further providing that in case of failure to fulfill, he will forfeit, as a penalty, a percentage of the price of services, &c., rendered, to be retained by the company from amounts becoming due for such services, &c., until completion of the contract ; and that no sums due over and above such percentage shall be paid until completion of the contract, and that such sums shall be appropriated to expenses incurred, if any, by the company, in obtaining completion of the contract beyond the expense provided for therein ; although it is to be very liberally construed as severe and highly penal, will if fairly made be fairly enforced.

So held in an action upon the contract for the price of services, &c., earned by the plaintiffs as assignees of the original contractors.

APPEAL from a judgment for the plaintiffs, entered on the report of a referee.

A firm of Brintnall & Richmond contracted, with the defendant, to perform labor and furnish materials therefor, in the construction of a section of its road, at prices named in the contract which was in writing, and with other provisions contained the following :

“ Should the contractors at any time, after sixty days from the beginning of the contract, not be found to proceed with all or any section of his work in such a manner as to secure, in the opinion of the engineer, the entire completion of the work on said section or sections within the time allowed by this contract, it shall be the duty of the engineer so to notify him ; and should he not then, within ten days from the date of the said communication, make the necessary exertions and arrangements to compensate, in the opinion of the engineer, for previous negligence or inactivity, and to insure the fulfillment in due season of his contract, the engineer shall notify the contractors and also the said railroad company to that effect, and the contract may then, in the option of the said company, be declared and considered null and void ; and the second parties shall, in such case, be at liberty to employ other persons to fulfill the contract and finish all or any parts of the work of graduation, masonry, or otherwise, on said section or sections, and the first party shall be liable for any damage or for any expense caused by his neglect to fulfill his engagements.”

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It was further agreed that, on receiving the above mentioned final notice from the engineer, and also a written declaration from the second parties, they thereupon consider the particular section or sections of work referred to by the engineer as abandoned, and the contract for said work null and void, they will give up and surrender to the engineer the road, &c.

It was also provided that, "in case of failure to fulfil the contract, the percentage which has been retained is hereby declared to be forfeited, as a penalty incurred in consequence of said failure; and no moneys which may be due the contractors over and above that percentage shall be paid until the contract is completed; and should the employment of other persons increase the cost of the work, such moneys shall be applied toward that additional cost; provided, that this penalty shall not be enforced excepting only when the contract for any section or sections is declared by the engineer to be forfeited and annulled, &c."

Payments were to be made on such contract monthly as the work advanced, upon the estimate of the engineer, with a reservation of twenty-five per cent by the company, until the completion of the contract.

The defendants agreed to pay for the work done, in case the contractors fully and faithfully performed on their part.

The work had been partly done, and the time for the performance of the contract had been extended, when the contractors assigned their interest therein to the plaintiffs, who before October 15, 1860, went to work upon the section, and furnished materials therefor; and the defendant opened with them an account upon their books, and recognized them as the parties who were to perform the work.

In December, 1860, the defendant's engineer, as provided in the contract, notified the plaintiffs, and also their assignors, that they were not proceeding with the work in such manner as to secure its completion, &c. No efforts were made to hasten the work; and on the 14th March, the engineer gave notice of the neglect to the plaintiffs, their assignors, and the

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defendants, as further provided by the contract; and on the 18th of the same month, the defendants took formal action, declaring the contract thereafter of no effect, and on the same day, the engineer notified the plaintiffs and said assignors of such action. The plaintiffs did not object to quitting work, nor insist on completing it. The defendants secured the balance of the work to be done by other contractors, at an expense of \$4,675 above what it would have cost if completed according to the former contract prices. At the time the defendants left work, there was due to them for services \$455.27, for which sum with interest the referee, reported in their favor.

N. C. Moak, for the appellants.

J. H. Reynolds, for the respondents.

Present—INGALLS, HOGEBOM and PECKHAM, JJ.

By the Court—PECKHAM, J. The full statement of this case is its own argument. The plaintiffs, as assignees of a contract with defendant, agreed to do certain things, in a certain time, and to proceed with the work in a certain manner. If they failed so to proceed, the contract, after prescribed notice, might be declared void by the defendant. It was further provided, that if any money was due the plaintiffs when the contract should be declared void, that no part thereof should be paid until the contract should be completed; and if, in completing the work, the cost thereof should be increased over the contract price, then the sum so due, should be applied to the payment of such increase.

The plaintiffs did not perform this contract; confessedly failed. It was declared abandoned and void. This was acquiesced in by the plaintiffs. The contract was then completed by defendant, at a cost beyond the contract price, largely exceeding the amount due the plaintiffs when the contract was declared void. Then, by the plain, clear terms of the contract, the plaintiffs had no right of action.

It is insisted that the report is right, because the sum

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reported due, appeared, by the defendant's books to be due to the plaintiffs.

That sum was due to them when the contract was declared void; that is, there was that balance in their favor at that time.

But they were bound to fulfil, or, when the time for fulfillment had expired, and there had been no extension and no completion there could be no recovery.

Further, in this case, it was expressly provided that this balance should be applied to the payment of any excess of cost in completing the contract over the contract price.

The amount of the balance was some \$400, and the amount expended by defendant to complete the contract, over and in excess of the contract price, was over \$4,000

It is also insisted that the defendant waived the forfeiture of the contract and the benefit of its provisions by paying money after the forfeiture had occurred. But the defendant paid no money on the contract after it was declared void, even if that would, under the circumstances of this case, revive its provisions. Had the defendant paid money on the contract after it was declared void, and the plaintiffs had then insisted upon going on with and completing the contract, it would have presented a very different case, but no such case is here.

The plaintiffs also urge that this contract is very severe and highly penal, and should be very liberally construed with a view to right and justice. To such a construction we agree. But we cannot adopt a construction that nullifies its provisions, as the plaintiffs' counsel does not claim or pretend that the contract is void or invalid in any of its provisions.

If fairly made (and there is no pretense to the contrary), it must be fairly enforced. There is abundant authority for upholding such contracts, if any were needed. (*Hennessey v. Farrell*, 4 Cush., 267; *Faunce v. Burke*, 16 Penn. State R.; 4 Harris, 478, 479.)

As to the non-performance of the whole contract defeating a recovery, see *Smith v. Brady* (17 N. Y., 173).

Judgment reversed and a new trial ordered, costs to abide the event.

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JOHN PARK, JAMES HIGGINS and JOHN RILEY, Plaintiffs in Error, v. THE PEOPLE, &c., Defendants in Error.

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(GENERAL TERM, THIRD DISTRICT, MARCH, 1869.)

A prisoner under sixteen years of age, convicted of burglary in the third degree, is liable to imprisonment in a State prison, and disqualified until pardoned, to testify as a witness.

So held, where the prisoner had been sentenced, after conviction, to the house of refuge in New York city.

And it seems the statutes, which provide for imprisonment of convicts in a house of refuge, do not relieve them from the disability to testify, which attaches under 2 R. S., 701, § 23.

JOHN PARK, James Higgins and John Riley were jointly indicted, with one Charles Corbin, for the offense of burglary in the third degree.

The defendants, except Corbin, pleaded not guilty to the indictment, and were put upon their trial at a Court of Sessions, held in January, 1869, in and for the county of Rensselaer. Upon the trial a *nolle prosequi* was entered in favor of Corbin, and the district attorney offered to have him sworn as a witness for the people. The counsel for the prisoners objected, and duly proved that Corbin had been previously duly indicted, convicted and sentenced for the crime of burglary in the third degree, and had never been pardoned or restored to his rights and privileges as a citizen.

It appeared, however, that Corbin was under the age of sixteen years when sentenced, and was sentenced to the house of refuge, in New York city, instead of to a State prison.

The court thereupon overruled the objection and allowed the witness to be sworn, and the counsel for the prisoners duly excepted to the decision of the court.

The witness being examined gave material evidence on behalf of the people, and the prisoners were convicted by the jury of the offense for which they stood indicted.

A bill of exceptions having been duly signed and sealed and allowed and a stay of proceedings, the district attorney brought the case before this court by *certiorari*.

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Charles E. Patterson, for the plaintiffs in error.

Francis Rising, for the defendants in error.

Present—MILLER, INGALLS and HOGEBOM, JJ.

By the Court—MILLER, P. J. The only question presented in this case arises as to the competency of Corbin to testify on the trial of the prisoners.

The act concerning "crimes and their punishment" (2 R. S., 701, § 23), provides that, "No person sentenced upon a conviction for felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor," &c. A subsequent provision (§ 30) declares what is meant by the term felony in the following language: "The term 'felony' when used in this act, or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a State prison." From these provisions it is manifest that in order to disqualify Corbin as a witness, he must have been convicted of a crime for which he was liable to imprisonment in the State prison. He had been convicted for the offense of burglary in the third degree, and the punishment provided for this offense is imprisonment in a State prison; but being under the age of sixteen years, he was sentenced and removed to the house of refuge, established for the reformation of juvenile delinquents in the city of New York, where he was confined until discharged. The sentence being thus changed from imprisonment in the State prison to a different form of punishment, it remains to be considered whether this change in any way affects the competency of the witness. This involves a consideration of the various statutes under which the modified form of punishment was imposed.

In 1824, the legislature of this State passed "An act to incorporate the Society for the Reformation of Juvenile Delinquents in the City of New York," (S. L. of 1824, chap. 126; 5 Edmond's ed. of Statutes, 206.) In 1826, this act was

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amended so as to require the managers to receive such children as might be convicted in any other city or county, and as might, or in the judgment of the court," &c., "be deemed proper objects." (5 Ed. Stat., 208.) In 1840, an amendment was made to the Revised Statutes which provided that, "whenever any person under the age of sixteen years shall be convicted of any felony, or other crime, the court instead of sentencing such person to imprisonment in a State prison, or county jail, *may order* that he be removed to and confined in the house of refuge," &c., "*unless notice shall have been received* from such society that there is not room in such house for the reception of further delinquents." (5 Edmond's Stat., 724, § 17.) This provision was not entirely mandatory, for in certain cases the court had no power to send to the house of refuge, which would leave them to the exercise of the right to send to the State prison under such circumstances. In the subsequent clause restricting the power to send, the use of the words "may order" evidently indicates, that the power conferred, was a discretionary one, to be exercised as the judgment of the court might dictate, and as the circumstances of the case in view of the statute seemed to require. If we stop here, there appears to be no question, that the power conferred was a discretionary one, to be enforced as might be deemed advisable by the courts.

It is essential, however, to examine some other statutes in in this connection. In 1846, the legislature passed an act for the establishment of a house of refuge for juvenile delinquents in western New York. (Chap. 143 of S. L. of 1846.) The sixteenth section of this act provided that the courts in particular counties, to be designated by the governor, should sentence to said house of refuge, every male under the age of eighteen, and every female under the age of seventeen, "who should be convicted of any felony," and left it discretionary to send offenders, who should be convicted of petit larceny or vagrancy.

Chap. 24, of the Laws of 1850, makes it the duty of the courts, in certain judicial districts, to order all juvenile delin-

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quents, by them sentenced, to be removed to the Western House of Refuge. It further provides, that "All such delinquents, convicted in the first, second, and third judicial districts, shall be ordered by such court to be removed to and confined in the house of refuge," &c., in the city of New York. It is claimed by the counsel for the people, that this is imperative, that the witness was sentenced to the house of refuge, and that, therefore, he was not sentenced for a felony, and not incompetent to testify. It will be noticed that the first clause of the section cited, makes it "the duty" of the court to order the removal, while the latter part of the clause uses the word "shall," which, sometimes, is equivalent to "may."

In the same year, by chap. 304, the sixteenth section of the act of 1846 was amended, and again, by chap. 387, of the Laws of 1852. It would thus appear, from these recognitions of the legislature of the sixteenth section of the act of 1846, that they understood that it still remained in force, and that they did not intend to repeal it. The construction thus placed upon it, tends strongly to show that the "juvenile delinquents" embraced in the act of 1850 were not intended for any juveniles convicted of a felony, who were already provided for; but related to offenders of a less grade. The term "delinquent," in its ordinary signification, implies one who has been guilty of some slight offence, of a very light grade, and not a felon or criminal; and it may well be claimed, in view of the legislative construction referred to, that only such were embraced in the act. There are also strong reasons for such a position, because there is no repealing clause of the sixteenth section of the act of 1846, before referred to. Nor is the provision of the Revised Statutes (5 Edmonds, Stat., p 574, § 17) expressly amended, as would no doubt have been done, if it was intended to alter it. The rule is well settled that a repeal by implication is not favored, and courts are bound to uphold the prior law if the two acts may well subsist together. The earliest act remains in force unless the two are manifestly inconsistent with and repugnant to each other, or unless, in the latest act, some express notice is

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taken of the former, plainly indicating an intention to abrogate it. The presumption is, that the legislature did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. (1 Sedg. on Stat. and Const. Construction, 127; *Bowen v. Lease*, 5 Hill, 225; *Williams v. Potter*, 2 Barb., 316.) I think the two statutes are reconcilable with each other, and especially the latter clause of the first section of the 24th chapter of the act of 1850 with the provisions of the Revised Statutes, as the former is not, under all the circumstances, to be construed as imperative. If it could be regarded as imperative, then every offense of the slightest character, whether tried in the higher courts or those of inferior jurisdiction, would be punishable by imprisonment in the house of refuge, and fines and other penalties imposed by the Revised Statutes would be entirely abrogated. In many cases this would operate with great severity, and such a sweeping change could never have been intended. It follows, from these observations, that the order removing a person under sixteen to the house of refuge, upon conviction, is the exercise of a discretionary power conferred by the statute, and not in conflict with the provision of the Revised Statutes before cited. That provision still remains unrepealed, and has been so regarded in all the various editions of the Revised Statutes which have been published since the act of 1850 became a law.

This view of the subject appears to be consistent with a reasonable interpretation of the various acts of the legislature referred to. The statute defining the word felony was designed to give a definition of the offense which embraced all cases wherein the offender was liable to imprisonment in the State prison, and includes the crime of burglary in the third degree for which Corbin had been convicted.

The subsequent provision, in the humanity which the law extends to persons of immature years, was intended after the conviction had been had, and the liability incurred of imprisonment in the State prison, upon its being ascertained upon

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examination that the prisoner was under sixteen years of age, to interpose and ameliorate the punishment by incarceration in an institution reformatory in its character, but not entirely to relieve the party of the disabilities which a conviction of the crime inflicted. Had such been the design, the statute no doubt would have so provided.

It is evident that the court erred in admitting the witness to be sworn and to testify, and for this error the conviction must be reversed.

Judgment reversed.

ADALINE BARNES, Appellant, v. NICHOLAS BUCK, Respondent.

(GENERAL TERM, EIGHTH DISTRICT, MAY, 1869.)

In an action founded on an alleged breach of the contract to marry, no warrant of attachment is allowed by the provisions of the Code; and where, in such case, an attachment has been issued, it will be set aside on motion.

The contract to marry is not, it seems, embraced in a statute referring to contracts in general.

APPEAL from an order of the Allegany Special Term, setting aside an order of attachment.

The court, in affirming the order below, adopted the following opinion there given by LAMONT, J. The facts are therein stated.

Judson and Ames, for the appellant.

Benson and Van Deusen, for the respondent.

Present—MARVIN, BARKER and LAMONT, JJ.

By the Court—LAMONT, J. This is an action founded on an alleged breach of promise of marriage. The defendant is not a resident of the State. The plaintiff obtained an attachment against defendant's property, and now the latter moves to set it aside, upon the ground that no warrant of attachment can be

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issued in such an action by the provisions of the Code. The reported cases have exhibited a wide difference of opinion upon the proper construction of those provisions of the Code, relating to the issuing of attachments. At present, however, the principal ground of such difference has been removed by the amendment of the Code, enacted in 1866, which restricts, by its terms, the cases in which attachments are allowable, to actions arising on contract for the recovery of money only, and actions for the wrongful conversion of personal property. (Code, § 227.) Before this alteration, an attachment might be issued "in an action for the recovery of money" (Code of 1849, § 227), or "in an action for the recovery of *the* money," as it was amended in 1857; and it had been held, in some cases, that this provisional remedy could be granted in actions of pure tort, as for an assault and battery. (*Hernstien v. Matthewson*, 5 How., 196; *Floyd v. Blake*, 11 Abbott, 349.) In other cases, it was held that no attachment could issue in an action for such wrongs. (*Gordon v. Gaffey*, 11 Abbott, 1; *Shaffer v. Mason*, 18 Abbott, 455.) It has become quite unnecessary to consider that question now; both, because the Code itself has been changed, and because the court at General Term, in this district, has decided against the construction which allowed attachments in actions for torts. (*Saddlesvene v. Arms*, 32 How., 280.) In the last case, the attachment was issued in an action of assault and battery, before the Code was amended in 1866. I am not aware of any decision, either allowing or denying the provisional remedy by attachment in an action founded upon a breach of promise of marriage.

If we look no further than the words of § 227 of the Code, which allows an attachment "in an action arising on contract, for the recovery of money only," it would at first view seem difficult to deny that an attachment is authorized in the present case, which is an action founded on an alleged contract to marry between these parties, and the action is also for the recovery of money only. Nothing but money is sought to be recovered for the alleged breach of the contract. The true meaning, however, of a single clause or sentence con-

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tained in the Code, cannot always be ascertained without looking into its other provisions. The Code is one whole statute, intended to provide a complete system of remedies for the enforcement of the rights of parties. Its different sections reflect light upon each other, and we should fall into serious errors, did we not compare together its various provisions in arriving at its proper construction.

"It is an established rule in the exposition of statutes," says Chancellor KENT, "that the intention of the lawgiver is to be deduced from a view of the whole, and every part of a statute, taken and compared together. The real intention when accurately ascertained will prevail over the literal sense of the terms, *scire leges non hoc est verba earum tenere sed vim ac potestatem*, and the reason and intention of the lawgiver will control the strict letter of the law, where the latter would lead to palpable injustice, contradiction or absurdity." (1 Kent Com., 461, 462.)

By § 129 of the Code it is provided, that the plaintiff shall insert in the summons a notice, in an action arising on contract for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fails to answer, &c. Again, in § 246, the plaintiff in any action arising on contract for the recovery of money only, is authorized to file with the clerk proof of personal service, &c., and the clerk shall thereupon enter judgment for the amount mentioned in the summons, in case the complaint is duly verified. These three sections, 129, 227 and 246, all contain the same phraseology, that is, the words "in an action arising on contract for the recovery of money only."

These sections relate to the first step in the action; that is, the summons (§ 129); to the final termination of the action; that is, the judgment (§ 246); and to this provisional remedy by attachment (§ 227). If an action arising on a breach of promise of marriage is, within the meaning of the Code, an action arising on contract for the recovery of money only, then it follows, that in such action, the notice in the summons should be, that if the defendant fail to answer, the plaintiff

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will take judgment for the sum specified in the summons, whether it be a hundred dollars or a hundred thousand; and if the plaintiff verifies the complaint, which she may safely do in every case, when the marriage contract shall have been made and broken, the clerk will be compelled for want of an answer, to enter judgment for whatever sum the plaintiff shall have the conscience to demand in the summons. (Code, §§ 129, 246.) It has been held by the more recent and better authorities, that an action founded on a breach of promise of marriage is not, within the meaning of § 129 of the Code, an action arising on contract for the recovery of money only. (*McNeff v. Short*, 14 How., 463; *Davis v. Bates*, 6 Abbott, 15; *McDonald v. Walsh*, 5 Abbott, 68.) Mr. Justice MARVIN, with the concurrence of a full bench, at General Term, in this district, came to the conclusion in the case of *Saddlesvene v. Arms*, before cited, that the provisional remedy by attachment is confined to actions upon contract (but now further including actions for the wrongful conversion of personal property), in which the amount to which the plaintiff is entitled can be specified. (32 How., 286.) How can the amount of money to which the plaintiff is entitled in an action for the breach of a promise of marriage be specified? The complaint alleges the agreement to marry, and the refusal to perform it. Can the plaintiff tell what she ought to have? Can the clerk enter a judgment for all the plaintiff supposes she ought to recover? I cannot bring my mind to the belief, that the scheme of the Code allows such a judgment to be obtained in such a manner. In this action, it becomes necessary to establish a contract of marriage, and a refusal by the defendant to perform it, to entitle the plaintiff to recover any, even nominal damages. But how much more than this she ought to recover, must depend upon circumstances which may not, and usually cannot, appear in the pleadings. Damages in this kind of action may be given to compensate the plaintiff for injured feelings, rejected affections, and wounded pride, as well as for an actual loss of marriage. And on the other hand, the conduct of the plaintiff may mitigate and reduce, even when it does not

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absolutely bar the plaintiff's recovery. (Sedgwick on Damages 369, &c.) Even the pecuniary condition of the defendant, may affect the amount of the recovery. (*Kniffen v. McConnell* 30 N. Y., 285.)

The scope of the reasoning in *Saddlesvene v. Arms*, above cited, is quite inconsistent with the idea that an attachment is allowable in this class of actions. In an action arising on contract for the recovery of money only, the plaintiff states in his summons that in case of defendant's default in answering, he will take judgment for a sum specified in the summons, that is, a sum of money certain ; and, in other actions, that in case of defendant's default, he will apply to the court for the relief demanded in the complaint. (Code, § 129.) By section 142, the relief demanded in the complaint is not any part of the plain and concise statement of the facts constituting a cause of action, but it is the relief to which the plaintiff *supposes* himself entitled. If the recovery of money be demanded, the amount thereof should be stated.

If it be something else than money, or if it be money, and something else in addition to money, that he supposes himself entitled to, he states what he demands accordingly.

A demand for money is as much a demand for relief, as a demand for the specific performance of a contract, a strict foreclosure of a mortgage, or for the recovery of the possession of real estate. Where no answer is made, the relief granted to the plaintiff cannot exceed that which he shall have demanded in the complaint (not in the summons), but in any other case, that is, in all cases where the defendant puts in an answer, the court may grant the plaintiff any relief consistent with the case made by the complaint, and embraced within the issue. (§ 275.) Whenever damages are recoverable, the plaintiff may claim and recover, *if he shows himself entitled thereto, any rate of damages* which he might have heretofore recovered for the same cause of action. (§ 276.)

No action can properly be said to be, within the meaning of the Code, an action arising on contract for the recovery of money only, as those words are used in §§ 129, 227 and 246,

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unless the supposed contract relates to property of some kind, to some pecuniary interests to be affected by its breach, and the violation of which enables the party aggrieved to state to the court, in his complaint, such facts as will show damages of a pecuniary character, and such damages as may be ascertained by some legal rule of indemnification.

Unlike other contracts, the agreement to marry has no necessary relation to property; it may be contracted between worthless paupers who expect, by its fulfillment, to realize no pecuniary benefit. When once consummated by actual marriage, unlike other contracts, between party and party, it cannot be rescinded or dissolved by their mutual consent. Marriage is more a civil institution of the State than a mere executed agreement between husband and wife, and the contract to marry, when violated, affords to the injured party a measure of redress, in the remedy given by the law, which does not attach to the violation of private contracts, but ranks among willful and malicious wrongs to the person and the character, wherein damages may be meted out to the delinquent party on the principle of punishment, as well as upon the theory of pecuniary indemnity, for actual loss sustained.

Furthermore, a contract, as that word is ordinarily understood, may be entered into between any two or more persons of full age; not so the contract to marry, into which only two persons can enter, and those unmarried persons, and of different sexes.

It is so far different from all other contracts, and has so many peculiar qualities not belonging to contracts in general, that it is not embraced in a general statute which speaks of, or regulates contracts, without some particular reference to the contract to marry. The rights growing out of ordinary contracts between party and party survive to their representatives; but the right and the remedy accruing from the contract to marry, die with the person, and cannot afterward be enforced. We are not without authority for holding that the contract of marriage is not to be considered as embraced in a legislative or constitutional provision relating to contracts,

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although the word used in the law may be the word *contract*, without any expressed qualification. The constitution of the United States provides that no State shall pass any law impairing the obligation of *contracts*. (Art. 1, § 10.) The constitution contains no terms expressly qualifying the meaning of the word "*contracts*," as thus employed; and if the contract of marriage is to be excepted from the operation of this constitutional provision, it must be upon the ground above suggested, that the marriage contract is *sui generis*, so special and peculiar in its nature, that it would not be understood, in the popular and general understanding of men, to be included in the term *contract* unless specially mentioned.

That question was discussed by a learned judge in the Court of Appeals in *Lawrence v. Miller* (2 Comstock, 245), but the majority of the court placed their decision upon another ground. (See page 253.) But in *White v. White* (5 Barb. 474), it was decided that the word *contracts* in the constitution of the United States did not embrace *marriage contracts*.

Mr. Justice MARVIN, in the case of *Saddlesvene v. Arms*, gave unanswerable reasons why an attachment is not allowable in an action for a wrong as for assault and battery, or slander. He deduced such conclusions from the various provisions of the Code compared together, and other statutes *in pari materia*, as well as by an examination of the machinery of the proceeding by warrant of attachment. He says (32 How. 285): "It is true, he (that is the plaintiff) is to specify the amount of the claim and the grounds of it; but in most actions of *tort* the damages are uncertain and entirely unknown until the verdict of the jury is rendered, and the plaintiff may fix them at any sum without the fear of conviction for perjury. This will not be so if the action is for the *breach of a contract*, for then the facts constituting the contract and the breach must be stated as the 'grounds' of the claim, and the *amount* of the claim must be stated. Here are sundry facts to be stated, and if they are not truly stated, the person making the affidavit may be convicted of perjury."

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These observations furnish a sound basis for his conclusion ; and they further show, that in speaking of a contract and the breach of it, he referred to a contract in the general and usual acceptation of that term, without thinking of the peculiar contract of marriage ; for in the case of an action founded on a breach of the latter, the damages are as uncertain and undefinable as they possibly can be in an action of slander or assault and battery. And this illustrates in a very forcible manner that the term "*contract*," as employed in ordinary and popular language is not supposed to include the contract of marriage.

The learned judge comes to the conclusion in the decision referred to, that "this remedy (by attachment) is confined to actions upon contract, in which the amount to which the plaintiff is entitled can be specified" (32 How., 286) ; and I fully concur in his reasoning and conclusion, which apply with equal force to the present case.

Whether the same identical words have the same meaning as they are used in §§ 129, 227 and 246 of the Code, it is not now necessary to determine. The construction put upon them as used in § 129, has been very fully considered in the case of *Tuttle v. Smith* (14 How., 395), and that decision approved in *Cobb v. Dunkin* (19 How., 164), both General Term decisions ; and those decisions were remarked upon as settling the construction of § 129, in a later case at Special Term in another district. (*Norton v. Cary*, 23 How., 469.) This construction is alluded to by Justice MARVIN, in *Saddlesvene v. Arms* (32 How., 283, 284) ; but without admitting that the warrant of attachment is to be confined to those cases, in which the summons must state that judgment will be taken for a specific sum if the defendant fails to answer, or to cases of liquidated damages.

If we adopt the construction put upon this language as used in reference to the summons in § 129, and give the same construction to the same language in § 227, it would follow that no attachment can be allowed in an action on a breach of promise of marriage. But even if that construction is too

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limited, as to which no opinion need be here expressed, I am still of the opinion that a warrant of attachment cannot be issued under the Code, except in case of actions arising on contract for the recovery of money only, where the breach of the contract can be compensated by some recognized legal rule or rate of damages, so that the sum due can be made certain either by computation or by evidence. In short, the contract must be one of a *pecuniary* character. This is not the case where the contract is, that one person will marry another, and nothing else. Such a contract is not, in any lawful sense, or ought not to be, a cash transaction. An order must be entered setting aside the attachment issued in this action, but no costs of the motion ought to be given.

Order affirmed.

GAMALIEL HUGGANS, Respondent, v. DANFORTH J. FRYER,
Appellant.

(GENERAL TERM, THIRD DISTRICT, MAY, 1860.)

A mortgagee of chattels, whose mortgage, in addition to the usual condition in case of non-payment, &c., contains a clause authorizing him, at any time, if he shall "deem himself unsafe," to take possession of the mortgaged property, "and to sell the same at public or private sale," may, in conformity to the terms of such clause, take possession of said property before the debt falls due, and sell the same, without making a demand for payment, and without giving personal notice of sale to the mortgagor.

If the property be unsafe, it seems, under such a clause, the mortgage debt becomes due, and the mortgagee acquires an absolute title to the property, subject to the mortgagor's right to redeem; and the right of redemption is cut off by the sale.

The mortgagee, in virtue of such a provision, took possession, advertised, and sold the mortgaged property, without demand, or personal notice of sale to the mortgagor, and brought an action for a balance due upon the mortgage, after applying the proceeds. It was *held*, that the mortgage was properly received, at the trial, as evidence of the claim thereon.

Also, there being no proof of fraud in the sale, and the question being put to the plaintiff, as a witness, without intending to establish fraud, whether

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the purchaser paid him any money thereon, that such question was properly excluded, as well as testimony upon the value of the property. *Held*, also, plaintiff might show that the sale was fairly made, and that plaintiff's testimony was competent upon the question whether he "deemed himself unsafe" to allow the property to remain in defendant's possession.

This was an appeal from a judgment entered on a verdict rendered at the Greene county circuit, in favor of the plaintiff and against the defendant, on the third day of June, 1868.

The action was brought to recover the amount of a promissory note made by defendant for twenty-three dollars and interest, and also a balance due the plaintiff upon a chattel mortgage given by the defendant to him for \$175. It appeared upon the trial that on the 6th day of April, 1866, the respondent sold a yoke of oxen to the appellant for \$175, and took back a mortgage upon the oxen for the price payable with interest on the 6th day of April, 1867, with a condition that in case of non-payment the plaintiff might take and sell the property to satisfy the debt. And with the further condition that in case the plaintiff should at any time deem himself unsafe, it should be lawful for him to take possession of the property, and to sell the same at public or private sale previous to the time above mentioned for the payment of said debt, applying the proceeds as aforesaid after deducting the expenses of the sale and of keeping the property.

It also contained a covenant that, if from any cause the property should fail to satisfy the debt, interest, costs and charges, the defendant would pay the deficiency.

The plaintiff, before the expiration of the year, deemed himself unsafe, and took possession of the property and sold the same, upon a public notice of sale of six days, applying the proceeds upon the mortgage, and brought this action for the deficiency, and on the promissory note which he held against the defendant.

The execution of the note and mortgage was admitted by the answer.

Upon the trial the counsel for the defendant objected to the

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introduction of the mortgage upon the grounds, that under the complaint no recovery could be had, as no notice of sale had been given to, nor demand made of the defendant; that without allegation of such notice and such demand, no evidence could be given. The court overruled the objection; the defendant excepted, and the mortgage was introduced in evidence. Evidence of the notice of sale was also objected to upon the same grounds and admitted. Exception was duly taken. Other testimony was admitted under objection, and exceptions were taken to the rulings made in regard thereto, as stated in the opinion. At the close of the evidence the counsel for the defendant moved for a nonsuit as to the claim upon the mortgage upon various grounds, and mainly upon the grounds of a want, of personal notice of the sale to the defendant, and of demand of payment before the sale, and that the sale was not made in good faith, but in fraud of the defendant's rights. The motion was denied, and an exception taken. No evidence being given on the behalf of the defendant, the court directed a verdict in favor of the plaintiff for the amount claimed, being \$149.10. Judgment was duly entered, and the defendant appealed to the General Term of this court.

James B. Olney, for the appellant.

Rufus N. King, for the respondent.

Present—MILLER, INGALLS and PECKHAM, JJ.

By the Court—MILLER, P. J. The chattel mortgage upon which the plaintiff claimed to recover in this action contained a condition that, in case the plaintiff should at any time deem himself unsafe, it should be lawful for him to take possession of the property mortgaged, and to sell the same at public or private sale, and apply the proceeds to the payment of the debt. The plaintiff, deeming himself unsafe, took possession of the property before the mortgage became due, and sold the same without giving personal notice to the defendant. It is contended by the counsel for the defendant, that the sale

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was illegal and void for want of such notice, and for this reason the defendant is not liable for the deficiency upon the sale. This position appears to be based upon the ground that the clause in the mortgage referred to, which provides for a sale before the mortgage is due, partakes somewhat of the nature of a pledge and its construction should be governed by the same legal rule which is applicable to pledges of personal property. While it is conceded that the instrument is a mortgage, which conveys a legal title to the property, subject to be defeated by the full performance of the condition, and liable to become an absolute interest at law if not redeemed by a certain time (4 Kent, 3d ed., p. 138; *Chamberlain v. Martin*, 43 Barb., 607), and not a pledge where a demand of payment, or a notice of sale, or both of them are necessary before a sale (4 Kent, 3d ed., 138, 139; *Wilson v. Little*, (2 Coms., 443; *Wheeler v. Newbould*, 16 N. Y., 392), it is insisted that the rights of the mortgagee *after* default, and when his title has thus become absolute, are entirely different from what they are *before* default; and that, in the latter case, he is a mere trustee for the mortgagor.

In case of non-payment, as required, the mortgagee is authorized "to take possession of said property, to sell the same, and the avails," &c., to apply in payment of the debt; and the condition of the mortgage, in case he deems himself unsafe, makes it lawful for the mortgagee to take possession of such property and to sell the same at public or private sale." Assuming that in the latter case the mortgagee was bound to sell, I think it does not follow that he was required to sell in any other way or manner, than he had power and authority to sell in, in case of default, or that he was bound to give personal notice of the sale to the mortgagor. Although some of the authorities speak in general terms of a sale upon previous notice to the mortgagor, yet none of the cases cited hold that such notice must be given to the mortgagor personally. In *Hart v. Ten Eyck* (2 John. Ch. R., 100), the chancellor decides that the creditor who holds goods in pledge, may sell them without a bill of foreclosure, on giving reasonable notice to

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the debtor to redeem. In *Patchin v. Pierce* (12 Wend., 63), it was held that the right to redeem may be foreclosed by the mortgagee, without judicial proceedings, by a sale of the property, upon reasonable notice to the mortgagor. (See, also, *Charter v. Stevens*, 3 Den., 33; *Lansing v. Goeld*, 9 Cow., 377; *Rich v. Milk*, 20 Barb., 616; *Chamberlain v. Martin*, 43 Barb., 610). These cases make no distinction, as to notice, whether the sale is made before or after default.

In *Chadwick v. Lamb* (29 Barb., 518), it was held that where personal property is mortgaged, and wrongfully converted, an action to recover its value before the debt is due lies if there is a clause in the mortgage which authorizes the mortgagee to take possession and sell the property to satisfy the debt secured by the mortgage, at any time he may deem himself insecure. In such cases the mortgagee acquires not only the right to the possession of the property, but any interest in it which the mortgagor had, except the equity of redemption. (See, also, *Mattison v. Baucus*, 1 Coms., 295; *Hill v. Beebe*, 3 Kern., 565.)

The property being unsafe, the whole amount of the mortgage became due, and the mortgagee acquired an absolute title to the property, subject to the right to redeem on payment of the amount secured. By the contract, he was not bound to give the mortgagee personal notice of the sale, and was authorized to sell at private sale, which would be entirely inconsistent with direct notice to the mortgagor of such a sale. At most, only the right of redemption remained in the mortgagor, by the payment of the sum secured by the mortgage; and, upon a sale being made, that right was gone. The taking possession of the property, and the advertisement of its sale, was in strict conformity with the condition, that when the mortgagee deemed it unsafe, he could sell and apply the proceeds to the payment of the debt. The whole amount secured having become due by the act of the defendant, it is difficult to see how the circumstances existing vary essentially, from a case where the time for the payment of the debt has expired. Nor am I able to discover that any fiduciary relation

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exists between the mortgagor and the mortgagee, except in case of a surplus arising upon a sale under the mortgage.

After a careful examination, I am satisfied that the proceedings of the plaintiff, in selling the property, were authorized by the mortgage, and in accordance with the law applicable to such a case; and that no error was committed by the learned judge upon the trial, in admitting evidence of the mortgage and notice of sale, and in denying the motion made for a nonsuit as to the mortgage.

I think that the court properly excluded the question put to the plaintiff upon his examination, whether the purchaser had paid him any money upon the sale of the oxen. There was no testimony in the case establishing fraud in the sale, and it was not asked, according to the case before us, for any such purpose.

The evidence given, shows that the defendant applied to the plaintiff to take the oxen back, he having no hay; that the plaintiff said he had no use for them, and if he did, he would be obliged to advertise and sell them; and that about two weeks afterward, he found the cattle, out of the defendant's possession, on his father's or mother's farm, run down and thin, and deeming himself unsafe, he took them away and advertised them for sale.

The proof of the value of the oxen, for the same reason, was not material. Nor was there any objection, in my opinion, to proving that the property was put up and fairly sold. It was also competent to ask the plaintiff, whether he deemed himself unsafe to allow the cattle to remain in the defendant's possession. He was bound to show this to justify the sale, and he, above all others, was competent to speak upon the subject.

No other question is made which requires discussion.

The judgment must be affirmed.

Judgment affirmed.

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ALBERT SQUIER, Appellant, v. MARIA NORRIS, Respondent

(GENERAL TERM, THIRD DISTRICT, MAY, 1869.)

A contract for the sale of lands, made and signed by an authorized agent, but not referring to the principal, or signed in the latter's name, does not bind the principal; and in an action against the latter to enforce specific performance, proof of the signer's agency is inadmissible.

So held where a husband having authority to sell, made a contract under seal for sale of his wife's lands, in his own name, without disclosing his agency.

Nor is the receipt of a portion of the purchase money by the principal, and his subsequent parol promise to be bound by the contract a ratification thereof by him.

To render a contract for sale of land, signed by an agent in his own name, binding on the principal, his agency and principal must appear from the instrument signed.

THE action was brought to compel the specific performance of a written contract under seal, dated October 28th, 1867, by which Samuel Norris, defendants' husband, agreed to convey to the plaintiff a farm owned by the defendant. The case was referred.

The referee found, among other things, that the defendant had previously given Samuel Norris parol authority to sell said premises.

That said agreement was entered into and signed and sealed by the plaintiff, and the said Samuel Norris in his individual capacity, and with the understanding by the plaintiff, that Samuel Norris was the owner of the premises.

That the sum of fifty dollars was paid by the plaintiff to Samuel Norris, as part of the purchase money, at the time the agreement was signed; and that said Samuel Norris, soon after receiving it, paid the fifty dollars over to the defendant. That after the defendant had been informed of the existence of said agreement, and prior to the first day of April, 1868, she made a parol agreement with the plaintiff, in substance, that she would, on the first day of April, 1868, convey the lands in conformity with the agreement, entered into between the plaintiff and Samuel Norris.

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That on the first day of April, 1868, the plaintiff tendered to the defendant the whole amount of money due on said contract, viz.: \$2,450, which the defendant refused to accept.

That the plaintiff also asked her, the defendant, to execute a deed which had been prepared in conformity with said written agreement, and with the said parol agreement, which she refused to do, and as conclusions of law he found and reported:

That the said written agreement did not obligate the defendant to convey said lands, because it did not purport to be her agreement.

That the subsequent parol agreement, made by her with the plaintiff, was void by the statute of frauds, because it was an agreement, in substance, to convey lands, merely referring to the written agreement between the plaintiff and Samuel Norris, for the terms and conditions upon which it was to be conveyed.

That the complaint should be dismissed and the defendant have judgment. Exceptions were duly taken to the referee's report. The referee was requested to report, that the defendant be decreed to specifically perform her contract, and that the plaintiff recover for damages, the value of the use of the property. The referee refused to report as requested and the plaintiff duly excepted.

Judgment was entered upon the report of the referee in favor of the defendant, and the plaintiff appealed to the General Term of the Supreme Court.

Andrew Thompson, for the appellant.

Niven & Thompson, and *A. J Parker*, for the respondents.

Present—MILLER, INGALLS and PECKHAM, JJ.

By the Court—MILLER, P. J. Two questions arise upon this appeal: First. Whether the execution of the written agreement for the sale of the defendant's lands by her husband, without the use of her name, obligated the defendant

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to execute a conveyance of the premises to the plaintiff. Second. Whether the parol agreement of the defendant, after the written contract was executed to convey the property in conformity with said contract, was a ratification of that contract, and bound her to fulfill.

The defendant had given her husband parol authority to sell the property, as the referee has found; and he executed the contract in his individual capacity, and with an understanding by the plaintiff, that he, and not his wife, was the owner of the property. By the statute of frauds every contract for the sale of lands, or an interest in lands, is void unless the contract, or some note, or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party, by whom the sale is to be made. (2 R. S., 135 § 8.) Another, and the next section, provides that any instrument required to be subscribed by any party, may be subscribed by the agent of the party lawfully authorized. (See § 9.) The contract which the plaintiff seeks to enforce in this action was not subscribed by the defendant and on its face did not purport to be signed by her agent lawfully authorized, or for her benefit, and therefore independent of any proof of authority of the husband, was not binding upon her. She had entered into no contract, unless it was done by the instrumentality of her husband acting as her agent, and by and with her authority and consent, which did not appear by the contract itself.

It is true that the authority of the agent may be conferred by parol, and that neither a written authority nor an authority under seal, is required. (*Worrall v. Munn*, 1 Seld., 243; *McWhorter v. McMahan*, 10 Pai., 386; *Lawrence v. Taylor*, 5 Hill, 107). But when the contract is under seal and entered into by an agent it must appear from the contract itself, that it purports to be made by the principal before it can be considered as obligatory upon the principal. We have been referred to several cases as authority for the doctrine that a subscription by the agent, without a designation of the principal, is sufficient. A critical examination of these cases establishes that to render

such an execution of a written contract for the sale of real estate valid and effectual, it must appear from the paper signed by the agent, that the agent acted in that capacity, and it must also appear who the principal was. In *Pinckney v. Hagadorn* (1 Duer, 89), which was affirmed by the Court of Appeals, it was held that the statute was sufficiently complied with, where the entry by an auctioneer of the sale in which the name of the principal appears, is signed by the auctioneer with his own name, without any reference to his character as agent. The court say: "The auctioneer's entry furnishes the *name of the principal*; and although that name does not appear in the subscription, the intention to bind him, and not the auctioneer personally, is perfectly plain, and makes it the contract of his principal." It will be seen that the name of the principal was incorporated in the memorandum, and the intention was manifest.

In *Tallman v. Franklin* (14 N. Y., 584), the auctioneer attached a letter, signed by the owner, which stated the terms of the sale on a page of his sale book, then made the residue of the entries requisite to constitute a memorandum of the contract and subscribed his name to it, and it was held that the letter was to be taken as a part of the memorandum subscribed by the auctioneer, and rendered it sufficient within the statute. The name of the principal was here also incorporated in the contract.

In *Bush v. Cole* (28 N. Y., 269), the action was brought by the purchaser against the auctioneers, who sold the house for a less sum than was authorized by the owner, who refused to give title, and it was held that the contract was not binding upon the owner, for the reason, among others, that the contract of sale "did not show who the *owner* of the premises was."

In *Townsend v. Corning* (23 Wend., 435), it was decided that a covenant for a sale of land, as well as a deed passing an interest in land, where the contract is made by *an attorney in fact*, to be valid, must be executed in the name of the *principal, by his attorney*, and that *his own name* is not enough. BRONSON, J. who delivered the opinion of the court, cites from

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Combe's case (9 Coke, 76), where the rule is laid down "tha. when any one has authority, as attorney, to do an act, he ought to do it *in his name who gives the authority*, for he appoints the attorney to be in his place, and to represent his person ; and, therefore, the attorney *cannot do it in his own name*, nor as his proper act, but *in the name and as the act* of him who gives the authority." He also cites from Bac. Abr., and numerous cases sustaining this doctrine. If this rule be applicable, then the defendant, not being named in any way in the contract, and it being in the name of her husband, she would not be liable for his acts, even if authorized.

In *St. John v. Griffith* (2 Abb., 198), there was a part performance of the contract by the defendant and an entire performance by the plaintiff, and it was decided that the defendants would be liable, in an action of this nature, upon the facts presented.

It is nowhere decided that an agent or attorney can bind his principal in a contract for the sale of lands where he enters into the contract in his own name and there is an understanding by the vendee that he was the owner of the premises. He may be liable personally in damages for a failure to fulfill, but to hold that such a contract is binding upon the party not named or referred to in any form and not known at all as a contracting party, would be in direct violation of the statute of frauds before cited. Where there is nothing in the body of the instrument, or in the form of a party's signature to indicate that the obligation thereby created was intended to be any other than a personal obligation on his part, parol evidence is inadmissible to show that the agreement was in fact the obligation of third persons, and that such party signed it as their agent. (*Babbett v. Young*, 51 Barb., 466 ; *Chappell v. Dann*, 21 Barb., 17 ; *Williams v. Christie*, 10 How., 12 ; *Lincoln v. Crandell*, 21 Wend., 101.)

I am therefore of the opinion that the execution of the agreement to sell the property by the defendant's husband was not binding upon her.

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2. As to the second question, I do not see how a parol agreement to convey real estate in accordance with a written contract made with another party, and not obligatory upon the party sought to be charged, can make that contract lawful, which was previously invalid. Such an agreement would be nothing more than a parol contract divested of all the elements essential to render it of binding force and validity. The referee has found that the defendant, after making a written contract, made a parol agreement for the sale of the premises, and not that she ratified the contract made by her husband. The promise to convey and the receipt of the fifty dollars paid, does not establish a valid contract, which is not affected by the statute of frauds. A wife may be bound by the act of the husband, who, without her authority, extends the time for making an award; and she received part of the money awarded to her, as was held in *Smith v. Sweeny* (35 N. Y., 295); but there is no authority for the doctrine that a parol agreement with the mere receipt of a sum of money renders the contract of the husband obligatory upon her. Neither such declarations nor the money received constitute in law the ratification of the assumed agency, and are not equivalent to an original authority.

We have been referred to several cases as authority for the principle that a party cannot repudiate the acts of an agent performed without authority, originally, where they have been subsequently ratified, and some benefit has been derived from them. (*Tracy v. Veeder*, 35 How., 209; *F. L. & Trust Co. v. Walworth*, 1 N. Y., 433; *Sage v. Sherman* 2 N. Y., 417; *Cobb v. Dows*, 10 N. Y., 335; *Ford v. Williams*, 13 N. Y., 577; *Hopkins v. Mollinieux*, 4 Wend., 465; *Evans v. Wells*, 22 Wend., 324.) None of these cases present the question now arising, and most of them do not relate to contracts for the sale of real estate. I am unable to discern in any of them authority for the doctrine that a parol agreement for the sale of real estate, made under the circumstances which characterize the transaction presented in this case, is valid and binding, and a ratification of a contract made by another party.

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I am also of the opinion that the agreement originally entered into between the plaintiff and the defendant's husband being void for want of the memorandum required by the statute, it could not be made legal and valid by parol. As no valid contract could exist by parol alone, a void contract could not be made lawful in that manner.

It follows that there was no error on the part of the referee in his findings or in his refusal to find as requested, and the judgment must be affirmed with costs.

Judgment affirmed.

CHARLES HANSE, Appellant, v. CALEB COWING, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

Upon the trial of an action to recover damages for continuing a nuisance, the plaintiff gave in evidence the judgment roll of a judgment in his favor, against the defendant, which was shown to have been rendered upon the allegation and proof, that defendant had caused the nuisance by erecting an embankment on his own premises.—*Held*, defendant was not precluded from showing, that he had parted with the possession and ownership of the premises, previously to the commencement of the action in which such judgment had been rendered.

To charge one who has created a nuisance, with liability for its continuance, after he has parted with the property upon which it is situated or caused, he must be shown to derive some benefit from the continuance; or to have sold with warranty of the continued use of the property, as enjoyed while the nuisance existed.

And it seems, in the latter case, a continued enjoyment of the nuisance, or of that which creates it, must be warranted.

This action was commenced before a justice of the peace; on appeal, a retrial was had in the County Court of Yates county, without a jury, where a judgment was rendered for the defendant, from which the plaintiff appealed to this court.

The plaintiff complained that the defendant, on the 1st day of June, 1862, had wrongfully built a dam or embankment,

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whereby the water flowing from the plaintiff's land along the highway had been prevented from running in its natural course, and had been caused to flow on the plaintiff's land, where it remained, to the injury of such land and the crops thereupon. The answer contained a general denial, and averred a former judgment in bar of the action.

Upon the trial, the plaintiff gave in evidence the judgment roll of a judgment, recovered by the plaintiff against the defendant, in the County Court of Yates county, upon a retrial before said court and a jury, on appeal from a Justice's Court, and upon a complaint which prayed damages for several distinct injuries to the plaintiff's property, and also, for that the defendant had, in the summer of 1861, caused a dam or embankment to be built upon his own property, causing the water to flow upon the plaintiff's land and injuring his grain.

The defendant objected to the admission of the roll, for the reason "that the verdict of the jury was general, and it did not appear, on which causes of action set forth in the complaint the jury had rendered it." The court received the evidence and defendant excepted.

Evidence was also given by the plaintiff, showing the questions litigated in the said prior suit, and that all the allegations in the complaint in said suit were litigated on the trial, and were submitted to the jury. He also gave evidence to show that the embankment mentioned in the complaint in said former action, had remained as before up to the commencement of this action, and that water flowed from the same, injuring his property as before that action.

Plaintiff also gave in evidence a deed from the defendant and wife and one Caleb C. Gardiner and wife to one John I. Rapalee, which conveyed a farm of 135 acres of land, including the premises upon which the embankment was erected, which deed contained a covenant of warranty in the usual form, and was dated April, 1863.

The defendant gave in evidence a deed from himself to said Caleb C. Gardiner, his adopted son, dated on the 14th June,

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1859, conveying sixty-three acres, part of the farm of 135 acres, and being the premises on which said embankment had been made. The plaintiff objected to the introduction of the deed, as being evidence of a transaction occurring before the trial of the action in which judgment had been previously rendered, claiming that defendant was estopped from showing acts prior thereto to exonerate himself from liability, and excepted to the decision of the court, receiving the evidence.

Defendant also gave evidence showing that he had joined in the re-conveyance of the sixty-three acres previously conveyed to Gardiner, because Rapalee, the grantee, was to receive a conveyance of Gardiner's part of the farm as well as his own, and one conveyance was executed to save expense. He also proved that Gardiner, after the conveyance to him, had gone into possession, and retained possession until the conveyance to Rapalee, who took possession, and held until he conveyed to one Baskin, who had been in possession since 1865. Plaintiff objected to this evidence as tending to open the litigation in the former suit, and excepted to the decision of the court admitting it.

The county judge ruled and decided "that upon the trial of the said former suit, evidence was given upon each of the allegations of the complaint; and that each was litigated upon the trial, and all were submitted to the jury," who had rendered a general verdict thereon.

He also found that since the commencement of the former action the plaintiff had sustained damages and injury to his freehold and the crops growing thereon, by reason of the embankment, to the amount of twenty-five dollars, but that the plaintiff had no cause of action therefor.

Franklin and Morris, for the appellant.

E. C. Breman, for the respondent.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—E. DARWIN SMITH, J. The chief question presented in this case is whether the plaintiff, having recovered

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in a former action for the erection of the dam or embankment in question, can maintain a second action against the defendant for a continuance of the nuisance.

The county judge correctly held that the record of the former judgment concluded the defendant, as to who erected the dam, and as to whether its erection was lawful or otherwise, and that for the purpose of the trial the said record was conclusive evidence that the defendant erected the dam, and that its erection as against the rights of the plaintiff, was unlawful.

The questions whether the defendant continued such dam after the recovery in such former suit, and if so what damages were thereby occasioned to the plaintiff, were new and open questions.

Upon the question of fact found by the county judge, I think he decided correctly that the defendant was not liable for the continuance of such dam after such recovery in the former suit. He finds that the former action was commenced June 25th, 1862; that the trial before this justice was on the 6th of October, 1862, and in the County Court in December, 1866; and that a general verdict was found for the plaintiff for thirty-five dollars damages before the justice, and of the same amount in the County Court, upon which judgment was afterward duly rendered. He further finds that on the 14th day of June, 1859, the defendant then being the owner of 135 acres of land upon which he then resided, on that day conveyed to his adopted son, Caleb G. Gardiner, about sixty-three acres thereof, and being that portion of the defendant's farm upon which he afterward erected said embankment; and that the said Gardiner soon thereafter went into possession thereof, and so remained until about the 23d day of April, 1863, when the defendant and his wife and the said Gardiner conveyed the whole 135 acres to one Rapalee, which deed contained the usual covenants of warranty; that all the parties united in the same deed under advice of counsel to save the expense of two deeds.

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That said Rapalee went into immediate possession and so remained in possession until April 1st, 1865, when he sold and conveyed the said premises to one John Baskin, who thereupon entered into possession thereof, and has since continued to remain in possession.

Upon this finding, it appears, notwithstanding the recovery against the defendant for the erection of such dam, and the damages occasioned thereby, that, at the time of such recovery the defendant was not, in fact, the owner of the premises on which such dam was erected, nor was he, in fact, in the possession of such premises.

The deed to Gardiner, and the proof showing these facts, were, I think, properly received in evidence. The deed was not received to overreach, and could not overreach or affect the former recovery, or impair its conclusiveness as to the facts involved in such recovery; but it was admissible to show that the defendant was not liable for a continuance of such nuisance after the commencement of such action for such recovery and judgment related to that time. (Sedgwick on Damages, 108; *Cole v. Sprowl*, 35 Maine, 161; *Blunt v. McCormick*, 3 Denio, 283.)

The continuance of a nuisance is a new nuisance, and gives a new right of action. (10 Mass., 74, *Staple v. Spring*.) The plaintiff clearly could not recover a second judgment for the erection of such dam and for all the damages consequent thereupon, and embraced or recoverable in the former judgment. He was bound to show a continuance of such nuisance, and damages after the commencement of such former suit, as held by the county judge in allowing the plaintiff to amend his complaint for that purpose. The new right of action therefore arose after the defendant had parted with the title and possession of the premises on which said dam was erected. The finding of the county judge clearly shows that the defendant had no title to said premises at the time of such former recovery, or possession; while he cannot escape the said former judgment and all the consequences resulting from its recovery, he can resist the recovery of a second judgment,

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which can only be maintained for a continuance of said nuisance, by showing that he was not responsible for such continuance or new nuisance, and did not, in fact, continue such nuisance, or create any new nuisance.

The general proposition is undoubted, that one who creates a nuisance is liable for its continuance as for a new nuisance, so long as it continues, but the proposition is not unqualifiedly true. To remain liable, he must, in fact, own or possess the premises on which the nuisance is erected, or must derive some benefit from its continuance.

Judge BRONSON, I think, states the rule correctly in the case of the *Mayor of Albany v. Cunliff* (2 Comstock, 174), as follows: "A party who has erected a nuisance, will sometimes be answerable for its continuance after he has parted with the possession of the land; but it is only when he continues to derive a benefit from the nuisance, as by demising the premises, and receiving rent (*Roswell v. Prior*, 2 Salk, 460; 1 Ld Ray, 713, S. C.; *Blunt v. Aikin*, 15 Wend., 522); or where he conveys the property with covenants for the continuance of the nuisance. (*Waggoner v. Jermaine*, 3 Denio, 306.)"

This was in the Court of Appeals, and Judge BRONSON had participated in the decision in the Supreme Court of the cases of *Blunt v. Aikin* (15 Wend., 522); *Fish v. Dodge* (4 Denio, 311) and *Waggoner v. Jermaine*, (3 id., 312) and as he cites *Blunt v. Aikin*, he clearly did not consider it overruled by *Waggoner v. Jermaine*; and in this same case of the *Mayor of Albany v. Cunliff*, Judge STRONG says: "The case of *Blunt v. Aikin* was not overruled, nor its authority shaken by the subsequent decision of the same court in *Waggoner v. Jermaine*." He said "that the latter case held that the creator of a nuisance who had sold the property on which it was situated, with a warranty for the continued enjoyment of it as used at the time, was responsible for damages sustained subsequent to his conveyance." With that modification, the doctrine of *Blunt v. Aikin* must be deemed still the law, and virtually affirmed by the Court of Appeals in this case of the *Mayor of Albany v. Cunliff*, *supra*.

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In *Blunt v. Aikin*, it was held that the defendant was not liable for the damages caused by the erection of a dam, which were sustained after he had left the possession of the premises and others had assumed it. In this case the dam or bank was not of itself a nuisance. It was in the highway, and turned the water flowing in the ditch, on the side of the highway, back upon the plaintiff's land. This action is brought for injuries resulting from the continuance of said dam after the commencement of the former suit. The proof given to sustain the action shows that the water flowed back upon the plaintiff's land, first after the commencement of the former suit in September or October, 1862, and in January, February and April, in 1863, and afterward more or less.

As it clearly appears that the defendant was not then the owner of the land upon which the dam was erected, or in possession when the plaintiff's right of action, for this injury caused by said back flow of water, arose, he clearly was not liable in this action for damages for such injuries within the said case of *Blunt v. Aikin*. His joining in the deed with Gardiner to Rapalee does not, I think, affect the question. He had previously granted the sixty-three acres to Gardiner, and had no interest in the land to convey at that time; and though the deed to Rapalee contained the usual covenant of warranty, the giving of such deed, under the circumstances, does not affect the question or bring the case within the rule of *Waggoner v. Jermaine*, as interpreted by Judge STRONG in the *Mayor of Albany v. Cunliff* (181), which is the sensible view of that case, and the only sound view or interpretation of it, in my opinion. The deed to bind the party who erects the nuisance should warrant the continued enjoyment of the nuisance itself, or what creates the nuisance as used at the time.

This case is not within the spirit or intent of the decision of *Waggoner v. Jermaine*.

The judgment of the County Court, I think, should be affirmed.

Judgment affirmed.

Peak v. Lemon.

SPENCER S. PEAK, Appellant, v. FRANCIS LEMON and MARY LEMON, Respondents.

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(GENERAL TERM, EIGHTH DISTRICT, NOVEMBER, 1869.)

By the present laws of this State the husband is not liable for the wrongful act of his wife, who, claiming a lien upon the personal property of a third person, refuses on demand to deliver it to such third person, who is the owner, where the wife claims such lien as her own separate property although, in fact, she has no lien, and her refusal amounts to a conversion.

And if the wife makes such refusal in the company or presence of her husband, the latter is not liable for such wrongful act of hers, nor is there any presumption that she is under the coercion, command, or direction of her husband, where she asserts her own claims in relation to her separate property.

It is the nature and not the validity of the wife's claim, respecting her separate property, which is the test of her liability and of her husband's exemption.

THE facts appear in the opinion of the court.

A. Storrs, for the appellant.

Angel and Finch, for the respondent.

Present—MARVIN, DANIELS, BARKER and LAMONT, JJ.

By the Court—LAMONT, J. The defendants, who are husband and wife, are jointly sued for an alleged conversion of certain personal property of the plaintiff.

On the 23d day of November, 1867, the plaintiff was the admitted owner of the property in question, which was at the place of residence of the defendants, in Cattaraugus county, where the plaintiff had, before that time, been boarding with defendants' family.

On that day a formal demand was made of the defendants for the property, when a harness and sleds, portions of it, were delivered to and taken possession of by the plaintiff. The first demand was made of the husband, in the yard of his dwelling, when he informed the plaintiff where the har

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ness and the sleds then were, which were taken by the plaintiff and his friends who accompanied him. The other articles were within the house.

The plaintiff's evidence tends to show that both defendants refused, on this occasion, to deliver to plaintiff the other articles, and that such refusal was put upon the ground that the plaintiff was indebted to Mrs. Lemon in the sum of fifty dollars, "for fifty-two washings," to secure which the property was detained. The defendant, Francis Lemon, denies in his evidence that he made any objection to Peak's taking the property when the demand was made.

On the same day, in the afternoon, a constable having an attachment in favor of the defendant, Mary Lemon, attached the harness and sleds, as well as some other things in controversy. Lemon, the husband, was with the constable and told him what to attach, and Mrs. Lemon was active in procuring the things to be seized under that process. It did not appear that the attachment was authorized, so as to make it a valid process to justify the taking of the property under it. The evidence tended to show that the wife acted throughout the proceedings without any compulsion or command of the husband.

On the behalf of defendants, it further appeared, that on the application of Mary Lemon to a justice of the peace, after the plaintiff's demand of the property, but on the same day, that magistrate issued the attachment in her favor against the property of the present plaintiff, Peak. The proceedings in this action were dismissed or abandoned, on the ground that no sufficient affidavit was presented to the justice to authorize the attachment, and nothing is pretended in this action to justify it. It must be regarded as null and void. Afterward, the wife procured another attachment, which was levied upon some of the property.

A judgment was rendered against Peak, in the latter suit, in favor of Mary Lemon, for \$30.20, damages and costs, March 21st, 1868, and an execution, issued thereon, was returned satisfied, within two days afterward. Peak paid up the judgment, and no property was sold on the execution.

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The counsel of the parties agreed upon the value of the property at \$86.39, for which a verdict was taken by direction of the court. The case was decided upon the ground that the original demand and refusal showed a conversion by the defendants of the property in question, except the harness and sleds, and that the seizure of these, under the first void attachment, amounted to a conversion of these articles; and further, that the seizure under the second attachment did not operate to defeat the cause of action for the prior conversion.

It requires no citation of authority to show that whoever prosecutes out a void process of attachment from the court of a justice of the peace, against the property of another, and procures it to be levied upon the latter's property, becomes liable to the owner for a conversion. If, afterward, the same plaintiff again seizes the same property upon process that is valid and regular, such fact does not purge the original wrong, nor go in mitigation of damages. (*Lyon v. Yates* (5:3 Barb., 237), and cases there cited.

The first process of attachment being void, it follows that nothing can be justified that was done under it, either by the plaintiff who obtained it, or by any other party who turned out the property and caused it to be seized by the constable.

If Mary Lemon, the plaintiff in that action before the justice, had not been the wife of the other defendant, the latter would still be liable to damages to the amount of the value of the property he caused to be seized under it, on the ground of direct personal interference in causing the levy. Some interesting questions arise as to the liability of the husband and wife, separately or jointly, upon the demand of the plaintiff's property, before the attachments were issued, as well as upon the seizure of the property under each of these processes.

At common law, the husband was liable to an action for damages caused by the torts or wrongful acts of his wife during coverture, when such wrongs were prejudicial to the person or property of others.

The action for redress of such wrongs, was brought against

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both husband and wife. (Reeves' Domestic Relations, 72; Cord on Rights of Married Women, §§ 1010, 1011, 1012; *Flanagan v. Tinen*, 53 Barb., 587.)

If the tort was done by the wife, in the company of the husband, the law presumed coercion on his part, or his direction to the wife, which excused her from responsibility; but such presumption was not conclusive, and the contrary might be established by proof. (*Cassin v. Delany*, 38 N. Y. R., 178; *Wagener v. Bill*, 19 Barb., 321.)

In 1848, a new course of legislation was initiated in our State, respecting the property of the wife; followed by important changes of the law, affecting the rights, remedies and business relations growing out of the state of coverture. The wife can now own and have the present use and enjoyment of property, both real and personal, and its rents, issues and profits; she may carry on any trade or business, and perform any labor or services on her sole and separate account; and her earnings from her trade, business, labor or services, are her sole and separate property, and may be used and invested by her in her own name. (Laws of 1860, chap. 90, § 2.)

By statute she may also sue and be sued, in all matters having relation to her sole and separate property, in the same manner as if she were sole. The husband is not liable for any of her contracts relating to her property, trade or business, and is exempted from costs in an action brought or defended by any married woman in her name. (Laws 1862, chap. 172, § 5.)

In regard to her separate property, she is made, by our law, as independent as her husband ever was in the ownership and enjoyment of his property. The earnings from her labor are her separate property. The law gives her the sole management and control of these matters, and deems her competent to act for herself, independently of her husband. Where her property, her dues and her litigation are concerned, the law now presumes her independence and personal capacity; and in relation to the management of her estate and the collection of her debts, she is no longer presumed to be under the con-

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trol or coercion of any one. In respect to her new rights and interests, the disabilities of coverture, as such disabilities existed at common law, are removed. The recent laws have surrounded her with new relations, declared her independence in certain particulars, and granted her new rights, out of which also arise new duties and obligations. The old common law is an utter stranger to the modern wife, and furnishes no decisions grounded upon that ancient relation of *baron* and *femme* which can apply as precedents to this new creature of the present day. But the principles of the common law regulating the conduct of other members of civil society who act on their individual responsibility as persons, *sui juris*, are applicable to the wife's present independent condition. The wife becomes, in law, a *femme sole*, an unmarried woman, in respect to her new situation, invested with the same rights and amenable to the same duties as other persons who are not under the guardianship or dominion of others. When she takes upon herself these new privileges she must also assume the burdens that belong to such a state of personal independence. In respect to her separate property and the earnings of her own labor, she is regarded by our law, as husbandless. In these respects the law does not now presume that the husband controls his wife, nor does it allow him to do so by any command or coercion.

In *Cassin v. Delany* (38 N. Y. R., 178), the questions decided arose in 1855, before the statute of 1860 and 1862 had conferred upon the wife this new capacity for trade and business on her own account. No questions there arose that are involved in this action. The old principles of the common law were applicable and were applied in that case. It has been recently decided that a married woman, engaged in the business of carrying on and operating a certain line of stages or omnibuses on her own account, is liable to third persons for injuries caused by the negligence of her servants in driving these vehicles; that she may be sued alone for such injuries, and her husband cannot be joined with her in the action, nor

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be made liable for such tort of his wife. (2 Abbott, N. S., 455, *Gillies v. Lent*.)

The court there say that the business which the defendant (the wife) conducts is her sole and separate property, for her husband has not, in virtue of his marital relation, any interest in, right to or control over its management; and an injury, caused by the unskillful or negligent way in which the defendant's business is conducted, is a matter having relation to her separate property. The wife may carry on business with all the incidents and rights of property. The husband is not liable for any bargains or contracts she may enter into to carry it on, nor is he answerable for a liability arising from the unskillful or negligent manner in which it is conducted.

In another case this court, at General Term (Seventh District), has laid down a rule quite inconsistent with the presumed subordination of the wife to the husband while in his presence, which prevailed at common law when the question at issue concerns her separate property. "When a married woman acts and speaks by her husband" say the court, "his declarations and acts are hers; and she must see to it, particularly when he assumes to act and speak in her presence for her, that he speaks and acts as the law and her duty would require her to speak and act if she spoke herself. She must in such case dissent and disapprove his acts and declarations, or they should be deemed hers. She cannot stand by and hear him assert rights for her and in her behalf or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. She must be deemed to assent when she does not dissent, under such circumstances." (*Lindner v. Sahler*, 51 Barb., 322.)

In those transactions wherein the wife is now empowered to act for herself, as an unmarried woman, free from the control of her husband, she is liable to the same extent as any other person would be under the same circumstances; and although her husband may be present with her she is presumed by the law to act without his coercion or command. So on the other hand, the husband is free from all liability

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for her acts in such cases to the same extent that another person, not her husband, would be in her presence. Where the husband is by the law deprived of the control of his wife's actions, he is by the same law relieved from liability for her acts.

In the present case the wife (Mrs. Lemon) held a demand against the plaintiff, Peak, growing out of her earnings or services, and when the plaintiff made demand of her for his property in her house she refused to give it up, claiming to hold it on account of the debt he owed her. Here she was in the wrong, for she had no lien on the plaintiff's property by virtue of which she could detain it till the debt was satisfied. She refused to deliver the property in the presence of her husband.

Under such circumstances does the law presume her to be an independent actor, or to be under the command or coercion of her husband? If she had had such lien as she claimed, she would have had a right to detain the property until the plaintiff paid her demand. She would then be clearly acting free from the control of her husband, in that new capacity conferred upon her by recent legislation. Suppose she had held a chattel mortgage on this property for the security of the same debt under which she claimed to detain it and had refused to deliver it, but it finally turned out in proof that the mortgage had been satisfied before the demand and refusal, so that, in fact, she had no lien; or suppose it was proved that the plaintiff had not in fact executed the mortgage, or had never delivered it, or that the mortgage was a forgery; suppose she withheld the property on claim of actual pledge for the debt, but on trial the proof of pledging failed. In the cases supposed she would have no lien or right to detain the property, and her refusal would be sufficient evidence of conversion. Still she would be asserting her right to her sole and separate property, or such claim would be in respect to her separate property. Cases will often happen with married women as with other claimants of property, that their asserted title totally fails in the event.

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She may, with her own money, purchase a horse from some person not the true owner. On demand made by the latter she will refuse to surrender the property, claiming to hold it as rightful proprietor. She is guilty of a conversion. I cannot conceive any difference in principle between the several cases supposed and the case now before us. The wife here claims to hold certain property as security for her own demand. She is acting in her own behalf and in relation to her separate property. It is the claim she makes, and not its successful assertion that must determine her responsibility. The husband has no power to prevent her making such a claim, nor would he be liable in case the property had been forcibly taken from her and she had brought replevin, trespass or trover for it as her own property, for the costs of litigation in case of her failure.

The learned justice who granted the new trial, was of opinion that the act of the wife in refusing to deliver up the property to the plaintiff, in her husband's presence, charged him as for a conversion, but did not charge her on account of the common law presumption, that she acted under his coercion or by his command. On the contrary, I conclude that a married woman, thus asserting her own rights or claims, acts at her peril like other persons under the same circumstances; that she is liable, and that her husband is not liable, and that it is not the *validity* but the *nature* of her claim which becomes the test of her responsibility and of his exemption. The husband in this case is not liable at all as husband, but can only be charged to the extent that he has interfered with the plaintiff's rights.

I do not mean to say, that there is not evidence in the case fit for the jury to determine, whether he did not so far intermeddle or set on the wife as to make him liable; but the jury has never passed upon that question.

The wife herself, is liable, upon her refusal to deliver, and claim to hold the property for her debt. She is liable also for the seizure under the first void attachment. The man, Lemon, denies that he refused to let plaintiff take the prop-

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erty when demand was made, and the plaintiff gave contrary evidence. This dispute was for the jury to settle. If the decision here was to turn exclusively on the legal points raised by the exceptions, perhaps a new trial should be denied, but this is a case with exceptions, and the granting a new trial on a case is somewhat in the discretion of the court. In order that the case may be retried, according to the rules above indicated, I think a new trial ought to be had. The order granting a new trial is, therefore, affirmed with costs.

Order affirmed.

IRA HOLDRIGE, Jr., administrator, &c., Appellant, v. MARY SCOTT, Respondent.

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(GENERAL TERM, EIGHTH DISTRICT, NOVEMBER, 1869.)

Executors and administrators suing in their representative character, *unnecessarily*, in cases where the cause of action (if any) accrues to them in their individual right, and, failing to recover, are personally liable to the defendant for costs.

Where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action vests in the executor or administrator in his private right, and he cannot in such case escape the penalty of costs by suing in form, in his representative capacity, unnecessarily, if he fails to obtain judgment.

Where the record shows the action to be maintainable (if at all) in the individual right, no motion is necessary to charge such plaintiff with costs; judgment therefor may be entered, of course, as in ordinary cases, upon the clerk's taxation.

Section 817 of the Code has not changed the former law of personal liability of executors' and administrators plaintiffs, for costs, in actions unnecessarily brought by them in their representative capacity where they might have sued in their individual right, and judgment passes against them.

The case of *Woodruff*, administrator, v. *Cook* (14 How., 481), considered to be an erroneous construction of the Code upon this subject.

THE facts appear in the opinion of the court.

D. H. Waite, for the appellant.

D. H. Bolles, for the respondent.

Present—DANIELS, MARVIN and LAMONT, JJ.

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By the Court—LAMONT, J. An order was made at Special Term on the motion of defendant, who obtained a verdict herein, charging the plaintiff with costs personally, from which plaintiff appeals to the General Term.

The question is, whether the Code (§ 317) has changed the law, as it before stood, in such a manner, that an executor or administrator prosecuting an action in his representative capacity, and failing in the suit, is exempted, *personally*, from liability for costs in all cases, unless the court shall personally charge him therefor, on the score of mismanagement or bad faith in the action; or whether the exemption from such personal liability is restricted to those cases, where he *necessarily* sues in his representative character. The distinction between those actions, in which executors and administrators must sue in their official right, and where they may maintain an action in their individual right, is well settled by a long series of decisions. Prior to the Code, executors and administrators were exempted from the payment of costs, although they failed to recover in actions brought by them as plaintiffs, provided such actions were *necessarily* prosecuted in their representative character, unless upon special application the court awarded costs against them for wantonly bringing any suit, or for unnecessarily suffering a nonsuit or *non pros*, or for bad faith in bringing or conducting the cause. (2 R. S., 615, § 17.)

This section of the Revised Statutes, in providing such exemption from personal liability, uses the terms, "*necessarily prosecuting in the right of their testator or intestate.*"

Before the Revised Statutes, and under the Revised Laws of 1813, in the chapter entitled "An act concerning costs" (vol. 1, p. 343, § 2), the exemption of executors and administrators from costs against themselves personally, when the actions they brought failed by nonsuit or verdict against them, was expressed by an exception in the following words: "*Except against executors and administrators prosecuting in the right of their testator or intestate.*"

The language granting the exemption was the same in each statute, except that the word "*prosecuting*" in the Revised

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Laws was changed into the words "*necessarily prosecuting*" in the Revised Statutes.

Before the statute had introduced the word "*necessarily*" in this connection, it was uniformly held that such personal exemption from costs in favor of executors and administrators as plaintiffs, failing in their suit, was allowable only when the action was necessarily brought by them in the right of their testator or intestate, and their personal liability for costs extended to all cases where they sued in their representative right unnecessarily; that is, where they could have brought their actions in their individual *right*. The word "*necessarily*," inserted in the Revised Statutes, only expressed more clearly what the law had been before.

The cases of *Ketchum v. Ketchum* (4 Cow., 87), and *Mann v. Baker* (5 Cow., 267), which arose under the Revised Laws are full to the point. In the case of *The People v. The Judges of the Albany Mayor's Court* (9 Wend., 486), which arose under the Revised Statutes, the effect of this change of phraseology is considered at length. The whole court there held that in the respect we are now considering the Revised Statutes had not altered the law as to executors and administrators plaintiffs (p. 489), and that the 17th section, 2 R. S., 615, (in which the word "*necessarily*" is found), was no doubt so drawn as to render clear and explicit what was perhaps obscure in the second section of the act of 1813 (1 R. L., 343, p. 490). The court further observed that all the sections of the Revised Statutes, except the said 17th section (p. 615), related to executors or administrators in their representative capacity, and therefore had no application to that case (p. 491); and the reason why they had no application was because that action was *not necessarily* brought in a representative capacity, but might have been brought in the individual right. (*Burhans v. Blanchard*, 1 Denio., 626.) The same distinction runs through the English cases as may be seen by the authorities before cited, and more at large in Toller on Executors, 439, 440; and the reason is given that in one class of actions, where the executor sues in *autre droit*,

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the law does not presume him to be sufficiently cognizant of the nature and foundation of the claims he has to assert, for the principal actor represented by the plaintiff is dead. But if he may bring the action in his private capacity, then, if he fail, he shall be liable to costs, as in an action for trover and conversion subsequent to the testator's death, &c., &c. (*Tilton's adm'r. v. Williams*, 11 John. 403.)

In all these cases the cause of action accrues to him personally, and, therefore, like every other plaintiff, he shall be subject to costs, nor shall be exempt by naming himself executor in an action, where there is no necessity so to do; otherwise, he may in all cases indiscriminately evade the payment of costs. (*Chamberlin v. Spencer*, 4 Cow., 550.)

The note of the revisers to § 17, 2 R. S., 615, shows that they contemplated no change of the law in the respect now in question. The construction of the courts has been uniform that an action prosecuted by an executor, &c., means, in statutory language, the same thing as an action necessarily prosecuted by an executor, &c., in relation to this question of their liability to, or exemption from the payment of costs.

The same rule of construction applies to the language of § 317, of the present Code. The language there employed: "In an action prosecuted by an executor, &c., means, necessarily prosecuted by the plaintiff in his character as executor." This conforms to the previous statutes and decisions, and to the reason and good sense of the case. This language in the Code is like that in the act of 1813. The word "necessarily" is not used in either; but that term, when inserted, did not change the meaning, nor does its omission now, in the Code, affect the true construction of its language. If § 317 of the Code is construed as similar statutes have been on the same subject, its language will have full force and effect. This section enlarges the right to costs, which follow, as a matter of course, against the executor or administrator failing to maintain his action, chargeable, however, upon, or collectable of the estate, fund or party represented; that is, even when the action is prosecuted or defended, necessarily, by a party

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in his representative or trust capacity ; and further, in such cases, the court may charge the costs personally on the party, as before, for mismanagement or bad faith. When, however, the cause of action accrues to an executor in his private right, this section does not so change the law that the executor may resort to the subterfuge of unnecessarily prosecuting, under the cloak of his representative character, when he ought to sue in his individual right, and thus, by assuming a false shape in his action, escape the penalty of costs for his failure to maintain it.

The case of *Woodruff, administrator, v. Cook* (14 How., 481), is not in accordance with these views, but we do not think that case well considered. It is in direct conflict with the case in 9 Wend., 486, above cited, and goes on the ground that § 317 of the Code repeals § 17 of 2 R. S., 615, and introduces a new rule of law as to costs of plaintiffs when prosecuting as executors or administrators. This view we think to be erroneous, and, nothing in the case therein cited (*Cunningham v. McGregor* 12 How., 305), gives countenance to the decision. On the contrary, the latter was an action by an assignee under an assignment for the benefit of creditors, who, the court says, necessarily prosecutes by virtue of his rights as trustee (Code §§ 111, 113), and adds that “ the same rules must be applied to his case as are applied in actions *necessarily* brought by executors or administrators in their representative capacity. The court, in *Woodruff v. Cook*, above cited, lays stress on the fact that § 317 of the Code repeals § 17 of 2 R. S., 615 ; but we have endeavored to show that such repeal (if made) works no change in the law in respect to the point now in question, and that the Code must, in this respect, receive the same construction so long put on similar language in the previous statute of 1813. Neither the facts stated nor the decision made in *Curtis v. Dutton*, (4 Sand., 719), affect the question. Where the record shows, as in *Woodruff v. Cook*, and in *The People v. The Judges of the Albany Mayor's Court*, that the cause of action, if any, accrued to the plaintiff in his private right, judgment for costs

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personally against the plaintiff follows, *of course*, although he names himself executor or administrator in his complaint.

In the present case, the alleged cause of action accrued to the plaintiff in his individual right, if at all ; failing, he must pay costs.

The order at Special Term should be affirmed.

Ordered accordingly.

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AND SUSQUEHANNA RAILROAD COMPANY.

(MONROE COUNTY CIRCUIT AND SPECIAL TERM, ROCHESTER, NOV., 1869.)

Issues of fact in the civil actions substituted for the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, are not, under the Code, triable, as of course, by a jury. When, in such action, the complaint and the nature of the case call for equitable relief, the cause regularly comes on for trial by the court. And, although on timely application, the question of title to the office might be tried before a jury, a demand for a jury, made after the parties and witnesses are present, prepared for the trial, and plaintiff has opened the case, read the pleadings and rested, may be refused.

Since the amendment, in 1854, to the general railroad law, which provides (§ 5), " that at every election of directors, the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it," a party challenging votes is not entitled to a production of the books, although a prior by-law of the company authorizes him to demand it.

If such by-law were in full force, it would only be directory, and the omission to comply with it, and the disregard of the challenge, would not invalidate an otherwise valid election ; but would cast on the parties claiming under it, the burden of showing that the voters so challenged were, or appeared by the transfer books when closed, to be actually shareholders in the company for the number of shares so voted.

It being provided by the by-laws, and stated in the notice of the annual meeting for the election of directors, that the polls would be opened at twelve, and continue open until one o'clock, the fact that the poll was not open until after twelve o'clock, and continued open until after one o'clock, does not invalidate the election.

A person who is not a stockholder, is sufficiently authorized to call a meeting of stockholders to order when he holds a proxy, and is requested by

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the president to call the meeting to order, and act for him, and such call is recognized by the stockholders present.

Surprise and fraud upon a part of the electors is ground for avoiding an election, and all acts done by portions of the corporators, which bear the appearance of trick, secrecy, or fraud, will be held invalid.

Accordingly, if a portion of the stockholders meet and organize before the hour named in the by-laws, and notice for the annual meeting, and afterward when the hour actually arrives, without any actual change in the organization, pass resolutions previously prepared, that the meeting proceed with the election of directors, with the same chairman and secretary, and also that the annual election of directors and inspectors proceed, with the inspectors first chosen, the organization of the first meeting is obviously a surprise and fraud upon many of the stockholders entitled to attend and take part in it; and the reorganized meeting in fact and in legal effect, but a continuance of the first meeting, and irregular and void as against such stockholders as do not participate in it; and such meeting as to its effect on the validity of another meeting duly organized soon after the proper hour, must be regarded in law as if it had never been held.

The *ex parte* appointment in a certain action of a receiver, who obtained possession of certain scrip and voted on it, and the *ex parte* appointment in another action, of interested parties as receivers of the books and papers and property of a railroad,—*Held*, evidence that the suits were instituted and the orders applied for with a fraudulent design to aid the election of a certain set of directors.

The practice in relation to the appointment of receivers *ex parte* reviewed. The service on inspectors of election, chosen at the last annual meeting, of an injunction restraining them from acting, and the service of an order of arrest, on the president of a railroad company within half an hour of the time fixed for the annual meeting,—*Held*, under the circumstances, an obvious and designed surprise upon the great body of stockholders of the corporation, and intended to hinder and embarrass them.

The pre-occupation of the directors' room, before the hour fixed for an election, by a large number of persons specially imported for the purpose and furnished with proxies, that they might participate in the stockholders' meeting and in the election,—*Held*, a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of *bona fide* stockholders.

It seems that an election held in distinct violation of a valid injunction duly served, would be set aside on a summary application to the court, pursuant to § 5, title 4, chap. 8, first part of the Revised Statutes.

There can be no such thing as an officer *de facto*, as against the people, in an action by them to try the title to the office. The doctrine in respect to officers *de facto* only applies to, and in favor of third persons, and to protect innocent parties who trust to the apparent title to an office.

The choice of a certain set of directors, procured through a preconceived

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scheme, combination or conspiracy, to carry their election by the use and abuse of legal process and proceedings, and by efforts and contrivances to prevent a fair election of inspectors, adjudged invalid; and another set of directors, chosen at another meeting of the stockholders, held at the same time and place, held to be duly elected.

Judgment ordered, at the suit of the people vacating certain receiverships, perpetually restraining proceedings in certain suits affecting the officers, books, stock and property of the corporation, and ordering such suits to be discontinued without costs.

THIS was an action brought by the attorney-general upon his own information, in pursuance of § 432 of the Code.

The complaint stated that the Albany and Susquehanna Railroad Company was a corporation created by and existing under the laws of the State of New York, organized for the purpose of constructing, maintaining and operating a railroad under the general laws of this State; that they owned and operated a railroad from Albany to Binghamton, in this State; that the stockholders of said company were divided into two parties, each claiming to hold a majority of the stock of said company, and each claiming that they were rightfully entitled to a majority of the legal votes cast at an election of directors of said company, which was held in the city of Albany, on the 7th day of September, 1869; that these differences led, prior to said 7th day of September, to a series of litigations, and gave rise to a number of actions. One of these actions was brought in the Supreme Court of the first judicial district, by Joseph Bush, against said company and others, for the cancellation of certain stock, and an injunction was granted therein against the conversion of bonds into stock, and a receiver of said stock was appointed. Another suit was brought in said court, in the county of Otsego, by the town of Oneonta, wherein an injunction was issued against the commissioners of said town, from voting on certain stock. Another suit was brought in said court, in the first judicial district, by David Wilbur, plaintiff, against said company and others, wherein an injunction was issued. Another action was brought in said court and district, by said Wilbur, against said company and others, in which an injunc-

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tion was issued. Another action was brought in said court and district, by Azro Chase, wherein the defendants, James Fisk, Jr., and Charles Courter, were appointed receivers of said road; and the said receivers gave bonds and took, or claimed to take possession of said railroad. Another action was brought, in the name of said railroad company, in the county of Albany, against Jacob Leonard and others, wherein an injunction was granted; and another action was brought in said court, wherein John W. Van Valkenburgh was plaintiff, and the said company was defendant, wherein Robert H. Pruyn was appointed receiver of said company; and he filed his bonds, and took, or claimed to take possession of said road. Another action was brought in said court and county, wherein the said road was named as plaintiff, and the directors and both receivers were named as defendants, wherein an injunction was granted. Another action was brought by said Pruyn, in the county of Albany, against the sheriffs of different counties, wherein an injunction was issued; that another action was brought by Jay Gould against said company, and that various proceedings for contempt, in violating injunctions, on both sides, had been instituted. All such proceedings were pending and undetermined, and various other suits between the contending parties were in progress, or threatened. And that the controversies arising out of such actions and litigations, had given rise to conflict of authority between public officers in attempts to execute conflicting processes from different judicial officers, to such an extent as seriously to threaten the public peace along the line of said company's railroad; that such controversies were temporarily quieted by an agreement between the contending parties, of which the following is a copy:

“ALBANY, August 11, 1869.

“*To the Governor of the State of New York:*

“By virtue of certain judicial proceedings, and conflicts of jurisdiction and collisions, it has become, and is impracticable to operate and run the Albany and Susquehanna railroad, either under the management of the directors, or the control

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of the persons claiming to be receivers. The public interests, and the obligations of the company, demand that the road should be run and operated, and the undersigned, as contending claimants to the possession of the road, hereby request you to appoint some suitable person or persons to act as superintendent, and to run and operate the road, under your directions, and during your pleasure, or until the necessity of such superintendence shall cease; said appointment, and the possession by yourself, and the person or persons to be appointed, not to affect the legal rights, or the present actual possession of the parties, respectively, to any part of said road, or the officers or property thereof. It is understood, that you are to employ such agencies, financial or otherwise, as you may require, and to fix the compensation of all persons employed by you."

That in pursuance of this request, the governor appointed Robert L. Banks executive and financial agent, to run and operate said road, and that the said Banks entered upon the discharge of said trust, and has since continued to have the charge and management of the same.

That on the 7th of September, then instant, the day fixed for the annual election for directors for said company, each of said contending parties, holding or pretending to hold an election, separate and apart from the others, elected a separate board of directors. One of said parties elected, or pretended to elect, J. Pierpont Morgan, and twelve other persons, named and made defendants in this suit, and the others, of said contending parties, elected, or pretended to elect, as directors of said company, Charles Courter, and twelve other persons, named as defendants in this suit.

The plaintiff further alleged, on information and belief, that both of said elections were illegal, irregular and void; that the inspectors of each side were appointed in a manner not authorized by law, or by the by-laws of said company; that stock was voted on, and by persons not authorized to cast a vote thereon; that the inspectors, on both sides, were restrained by injunctions, while the election was going on,

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from acting according to their own judgment ; that the transfer books were not present, and were not produced, although demanded by several stockholders ; that several towns, along the line of said road, were owners of the stock of said company, and that three or more of such towns were represented at said election by rival commissioners, and votes on such stock were cast on each side.

That Joseph H. Ramsey had given notice of the presentment of a petition to the Supreme Court for the removal of the last named board of directors, and for the confirmation of the election of the first named board of directors ; that another action had been brought in the name of Eli Perry, as plaintiff, to restrain the last above named board of directors, Charles Courter, and his associates, from acting as directors ; that five other suits had been brought in relation to the said matters referred to, in one of which, the defendants Groesbeck, Chamberlain, Morrell, Boyd, Vincent and Falls were plaintiffs ; in another, the said company and J. H. Ramsey were named as plaintiffs ; in another, John W. Van Valkenburg ; in another, Minard Harder, and in another, John Eddy as plaintiffs.

That plaintiffs were informed that the last named board threatened, and intended to bring suits, to compel the delivery to them of the property of the company, and to secure the recognition of their claims as directors of said company.

The plaintiff further alleged that each of said pretended boards of directors threatened, and intended to take, or claimed to have possession of said railroad, and all the property, books and papers belonging to said company, and to exercise all the franchises, privileges and corporate rights granted to said corporation, and the plaintiffs alleged and insisted that such claims were without foundation in right, and if such threats were carried into execution by either of said contending boards of directors, it would be a usurpation of the franchises and corporate rights of said corporation, and would lead to a conflict of judicial authority, and to a breach of the peace, and the good order of the community. The plaintiff further

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alleged, upon information and belief that large amounts of the stock of said company, and other property of said company, had been alienated and transferred by the officers of said company, contrary to law, and foreign to the business of said company, and particularly to a number of persons therein named.

The plaintiffs further stated that the governor was desirous of being relieved, and of relieving those appointed by him in the management of said railroad, from the positions occupied, and the responsibility borne by them under the agreement aforesaid; that the governor could not determine, without danger of doing injustice to one of the parties, whether either of said boards, and if either, which of them, was lawfully entitled to the possession and management of said road, and of the company's affairs; that the decision of the governor, if made, would not have the force of a judicial determination, and might result in injury to the corporation.

That the governor had, therefore, requested that this action be brought, in order that the said railroad might be placed under the direction and control of competent judicial authority, independent of both contending parties, until the rights of the respective parties to the said controversy, could be judicially determined. The complaint prayed for an injunction against the defendants composing the two boards of directors, restraining them from taking possession of, or in any manner interfering with the said railroad, or any of its property, books and papers, and from exercising the franchise, privilege or corporate rights of said corporation, and from acting as directors or officers of said corporation: also, that it be adjudged whether either of the said elections were regular and legal, and if either, which of them; that if neither of said boards be declared duly elected and entitled to hold office under said elections, that both classes of said defendants be removed from office, and a new election ordered by the court. Also, that the defendants be restrained from prosecuting any of the suits heretofore brought, as above stated, and from commencing any new suits or proceedings in rela-

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tion to said controversy, and that they be restrained from holding any other election of directors of said company. Also, that receivers Pruyn, Courter and Fisk be restrained from taking possession of said railroad, or in any way or manner interfering with the same, and that a receiver be appointed to take possession of the road.

The defendants composing the board of directors, embracing Walter S. Church, Charles Courter, James Fisk, Jr., and others, answered the complaint, and set up that they were, in all respects, lawfully elected directors of said company, at the time and place mentioned in said complaint, and claimed that said election was fairly and lawfully conducted, so far as related to their own election, and denied the validity of the election, of the other board, headed by J. Pierpont Morgan, and denied that such election was held by legal inspectors, and alleged that such inspectors did not take their places, or receive votes, or act as inspectors, until more than twenty minutes after the regular inspectors had commenced to act, and more than twenty minutes after the time fixed by the by-laws of said company for opening the polls, and in effect admitted otherwise, the general allegations of the complainant, and demanded judgment, that the election of these said defendants as directors of said corporation, be declared and adjudged regular and valid, and that the said defendants, Walter S. Church, Charles Courter and their associates, be put in possession of the property and franchises of said corporation, and an injunction issued, as asked for in the complaint, against the said Morgan and others, claiming to act as directors of said corporation, as against the said defendants.

The defendants, J. Pierpont Morgan, Robert H. Pruyn and others comprising the other board of directors, in like manner answered the complaint, asserting the legality of their elections, and denying the legality of the election of the said board headed by Walter S. Church, Courter and others; and denied that James Fisk, Jr., and Charles Courter were lawfully appointed receivers, and insisted that such appointment was illegal and void, and alleged that a receiver of said road

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had been previously duly appointed, and was in possession of said road at the time of such appointment; and alleged that the pretended order appointing Fisk and Courter receivers, and all other orders and injunctions, including said order appointing said receivers, were obtained by false and fraudulent misrepresentation and suppression of the truth, and in aid of a conspiracy against the interests of said railroad and the stockholders thereof, and in order to get the possession, control and management of said road away from the stockholders of said company, to the end that it might be managed and controlled in the interest and for the benefit of Jay Gould, James Fisk, Jr., and others acting with them; and otherwise, in effect, admitted the general allegations of the complaint, attesting that all that had been done by them, or others acting with them, had been lawful and fair, and properly done for the best interest of said corporation, and demanded judgment that said directors, J. Pierpont Morgan, and his twelve associates, might be adjudged and declared duly and legally elected, and rightful directors of said company, and, as such, entitled to the possession of its property, and to the exercise of the rights and franchises thereof; and that the election of the said Charles Courter, James Fisk, Jr., and others, be declared illegal and void; and that the stock, whose validity was questioned in the complaint, be established, and that an injunction issue, as asked for in the complaint, against the said Charles Courter, and others, restraining them from interfering with the property of said corporation. Two answers were put in, nominally, by the railroad company, by different attorneys; each claims to represent the corporation, &c., said answers concurring, in substance, with the answers of the said respective board of directors, as above stated.

Answers were also put in by the other defendants, Dabney, J. P. Morgan, Goodwin, George H. Morgan, Bush, Groesbeck, Chamberlain, Vincent, Morrell, Falls, Boyd, Sloan, Thompson and Green, denying the allegations of the complaint in respect to such parties, so far as such allegations questioned the validity of the stock held by them respectively; and asserting the

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validity of such stock, and of their title to the same; and therein admitting the general allegations of the complaint.

The issues thus formed came on for trial at an adjourned Special Term and Circuit, held at Rochester on the 29th day of November, 1869, when,

Marshall B. Champlain, attorney-general, *George G. Munger* and *Stephen H. Hammond*, assistant attorney-general, appeared for the people.

William F. Allen, *Charles Tracy*, *Aaron J. Vanderpool*, *Henry Smith*, *Matthew Hale* and *John H. McFarland* appeared as counsel for Joseph H. Ramsay, J. Pierpont Morgan and other defendants.

David Dudley Field, *John H. Martindale*, *William C. Barrett* and *Dudley Field* appeared for James Fisk, Jr., Jay Gould, Charles Courter, Walter S. Church, and defendants of the same class of directors.

By the Court—E. DARWIN SMITH, J. Upon the issues presented in the pleadings, and the mass of evidence taken upon this trial, the first question presented for my decision relates to the power of the court in equity to give the relief demanded in the complaint.

The mode of determining the title of a party to an office, prior to the Code, was by *quo warranto*, or by information in the nature of a *quo warranto*; and these proceedings could only be instituted and prosecuted to effect in the courts of law.

Section 428 of the Code declares that the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished, and that the remedies heretofore obtainable in those forms may be obtained by civil actions, under the provisions of that chapter.

Section 432 of the same chapter provides that an action may be brought by the attorney-general, in the name of the people, upon his own information, or upon the complaint of any private parties, against the parties offending: "Where any

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person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State;" and § 440 of the same chapter is as follows: "Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise." These sections of the Code clearly authorize the institution of this action, in the name of the people. Such action must be commenced and prosecuted like other civil actions, and is to be governed, in respect to the pleadings and proceedings by the same rules. (*The People v. Cook*, 4 Seld., 67; *The same v. Clarke*, 11 Barb., 337; *The same v. Ryder*, 2 Kern., 433.) The Code, § 142, requires that the complaint in all actions shall contain a plain and concise statement of the facts constituting the cause of action. The complaint in this case conforms to this rule, and asks appropriate relief. The relief demanded consists in, and the nature of the case requires, the exercise of the equitable power of the court. In conformity with the prayer of the complaint, an injunction has been issued and a receiver has been appointed, which are the usual and appropriate instrumentalities of a court of equity. The action is therefore properly brought. The subject-matter of the controversy is clearly within the jurisdiction of the court, and the only point of any practical consequence in this connection relates to the mode of trial. Issues of fact upon *quo warranto*, issues of fact upon the relation of a party claiming an office, upon information, when the party proceeded against was in the possession of the office, before the Code and usually since, have been tried by a jury upon the issues made by the pleadings. The chapter of the Code in respect to actions in place of *scire facias*, *quo warranto*, and of informations in the nature of *quo warranto*, has been enacted and incorporated into the Code since its original enactment in 1848, and no express provisions are made in said chapter, or elsewhere, that I have been able to find, providing for the trial of such actions. Section 253 of the Code provides that issues of fact in actions for

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the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury is waived and § 254 provides that every other issue is triable by the court, which may, however, order the whole issue, or any specific question of fact involved therein, to be tried by a jury.

The issues of fact, therefore, formed in this action, were in the first instance and are triable, by the court, but the two most important and leading issues might have been submitted to a jury; and if an application had in due time been made for that purpose, it would most probably have been granted, and the court thus have been relieved of the unpleasant burden and responsibility of passing upon the facts of the case. But no application or suggestion of that kind was made to the court until the cause had proceeded to trial, and the attorney-general had opened the case, read the pleadings, and rested; when the parties and counsel being on both sides present, and not unprepared for trial, and a large number of witnesses also being in attendance, I held that the application came too late, and that the trial must proceed. It remains, therefore, for me to pass upon the issues made by the pleadings, as with other cases tried by the court.

Before proceeding to discuss the evidence applicable to the leading issues in the action, I will state such preliminary facts as I deem fully established by the evidence, and undisputed.

The Albany and Susquehanna railroad is a corporation organized in 1851, under the general railroad act of 1850, with a capital, originally, of \$1,400,000, divided into 14,000 shares of \$100 each, and subsequently increased, by special act of the legislature, to \$4,000,000; and entitled, under the fifth section of the general act, to thirteen directors, to be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation.

The by-laws provide that the annual election of directors should be held on the first Tuesday of September, 1852, and

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on the same day in each year thereafter, at such place as might be prescribed by a resolution of the directors the preceding year; the polls to be open at twelve o'clock at noon, and to continue open until one o'clock in the afternoon; that no transfer of stock should be made for thirty days next previous to the annual election of directors, and on the day of election the secretary should present to the inspectors of election, the transfer books, and an alphabetical list of the names of stockholders entitled to vote at such elections, and the number of shares held by each; and that at the election in 1852, and at each succeeding election, three persons, who are stockholders, shall be chosen by the persons entitled to vote for directors, as inspectors of the next succeeding election. It was also duly proved that a public notice of the holding of the annual election for thirteen directors of said corporation was duly published for more than thirty days before said election, the first publication being on the 3d day of August, 1869; and that said notice stated that such election would be held at the office of the company, No. 262, Broadway, in the city of Albany, on Tuesday, the 7th day of September, 1869; that the poll would open at twelve o'clock, noon, and continue open for one hour thereafter, and that the transfer books would be closed on the 7th day of August, and reopened on the 8th day of September.

At the stockholders' meeting, convened in pursuance to this notice, it also appears that the inspectors of election chosen at the annual election in 1868, to conduct the election for 1869, did not qualify and act, having been restrained from so doing by injunction; and that as the proper resource of the stockholders in that exigency, both classes of stockholders desiring to contest such election, proceeded to choose inspectors for such election. It is not disputed that such was the right of the stockholders so appearing. (*Vide Matter of Wheeler*, 2 Abbott Rep. N. S., 361.)

Upon the evidence on the merits, it appears that on the day and at the place fixed for such election, the stockholders of said railroad company appeared in large numbers, and chose

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two sets of inspectors, and held two independent elections in the same room, both proceeding at the same time ; and that, in proper form, each set of inspectors certified to the election of a board of thirteen directors at each poll, one class of whom I will call, for greater distinction, the Ramsey board, headed by J. Pierpont Morgan ; and one the Fisk board, headed by Charles Courter and Walter S. Church ; that each of these classes of men organized after such election as a board of directors of said corporation, and claimed to be lawfully elected, and to possess the right to exercise and control the franchises and property of said corporation.

The chief issues for my decision arise upon these facts, and the evidence relates to these conflicting claims, and I will proceed to discuss them in the order in which they were tried.

First: Was the election of the board called the Ramsey board of directors valid and legal, or otherwise ?

The evidence I think clearly establishes that the inspectors, Snow, Eddy and Harder, who held this election, were chosen at a meeting of the stockholders, held in the hall of the company's office or building, organized soon, and I think from ten to fifteen minutes after 12 o'clock at noon ; that they took the oath of office prescribed by the statute regulating elections by incorporated companies (§ 7, of title 4, chap. 18, part first, of the Revised Statutes,) and immediately proceeded to open the polls and receive votes from the stockholders present offering the same, and received the votes of persons so voting, in person and by proxy, upon 10,742 shares of the stock of such corporation, all of which votes were given for the said class of directors, headed by the said J. Pierpont Morgan ; and that they held such poll open until about half-past one o'clock of the same day, and then canvassed the votes and made and executed in proper form a certificate of election, certifying in form and effect that the said class of thirteen persons, headed by J. Pierpont Morgan, were duly elected directors of said company, and that each one of them received 10,742 votes for such office, and all the votes cast at such election.

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So far as the form of the proceedings upon this election is concerned, I do not see why it was not in all respects regular and valid. The inspectors took the proper oath, and proceeded in the regular and usual way to hold said election. The treasurer presented to them an alphabetical list of the names of the stockholders entitled to vote at such election, comprising the names of all the stockholders whose names appeared upon the ledger and transfer books on the previous 7th of August, or whose stock, scrip, power of attorney or assignment for transfer had been presented to the treasurer for transfer before that day. No votes were received except from persons, or their proxies, who appeared by such list of stockholders to have been stockholders on the said 7th of August, and their names were carefully marked and checked upon such list as their ballots were received. It is true that every vote so received was challenged by some person appearing and claiming to have a proxy entitling him to vote at such election, but not by any stockholder or person holding a proxy, who did in fact vote or offer to vote at such election. The person so making the respective challenges did also demand to see the books or the transfer book of the company at the time of making such challenges. These challenges were disregarded so far as the same related to the production of the books, but reference in respect to the right to vote in each case was made to the said list of stockholders so provided by the treasurer. The party making these challenges was not entitled to a production of the books. The challenges were doubtless made in pursuance of the by-law number two of the company, above set forth, which must have been adopted prior to 1852; for the by-law, section number one, provides for an election to be held on the first Tuesday in September, 1852, and the printed book of by-laws, a copy of which has been furnished to me, appears to have been printed in 1853.

After that period the general railroad act was amended, in 1854. Section five of the amended act provided "that at every election of directors the books and papers of such com-

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pany shall be exhibited to the meeting if a majority of the stockholders present shall require it." This provision applies to the election of directors of all railroad companies organized under the general law. But if this by-law were in force it would be simply directory, and the omission to comply with it, and the disregard of the challenge would not invalidate the elections if otherwise valid. It would doubtless cast upon the parties claiming under it the burden of showing that the persons voting at such election, and so challenged, were or appeared by the transfer books on the 7th of August, previous, to be actually stockholders in said company, and for the number of shares so voted. This was done on the trial by the production of the books, and the production of the ballots then deposited and preserved, and the proxies presented to the inspectors, and delivered to them at the time of such election. From the books and list of stockholders so voting, the ballots deposited, and the proxies so delivered and produced, it appears that the persons who voted at that election, in person or by proxy, were actual and lawful stockholders of said company at the time, and were legally entitled to vote at such election, with possibly an exception in respect to one or more of such voters, which, as there were no opposing votes, cannot affect the validity of the election, if it were in other respects lawfully held by said inspectors. The fact that the poll of said election was not open until after twelve o'clock, and was held open until after one o'clock, does not affect the validity of the election. It would not have been lawful to open such election before twelve o'clock, for that was the time fixed in the notice, and no one was bound to be present before that time; but after the election was begun it was not improper for the inspectors to keep it open as long, within a reasonable discretion, as was necessary to receive the votes of all the stockholders present, ready and offering to vote. (Vide 19 Wend., 147. In the matter of the *M. & H. Railroad Company*.)

The objection that the meeting of stockholders held in the hall of said office or building was called to order by Henry

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Smith, who was not a stockholder, is not tenable. He held a proxy given him and others to vote for one town, and besides he was requested by Ramsey, the president, to call such meeting to order and to act for him. This request was sufficient authority for him to act in the place of Ramsey, who was then held in custody upon an arrest by the sheriff of Albany, in an adjoining room. The call was recognized by a large number of stockholders then present. Hendrick, who acted as chairman, was a stockholder, and he was chosen by the affirmative votes of many stockholders present, no one objecting. The vote put by him on the election of the inspectors was fairly and properly put, and the inspectors duly elected by stockholders in such meeting, but few if any voting in the negative. The inspectors immediately entered upon the discharge of their duty, and many stockholders recognized them as lawful inspectors and proceeded to vote at the poll opened by them. If nothing else appeared, this election so held by them would unquestionably be valid, and the persons voted for as directors declared by them to have been duly elected, would be the legal directors of said corporation if the meeting of stockholders at which they were so elected inspectors was a lawful meeting. And there is no ground for its impeachment presented in the evidence or seriously urged at the trial, except that a prior meeting of stockholders had been duly held in the directors' room of said building on the same day, over which Walter S. Church presided, at which another set of inspectors had been duly elected who had opened a prior poll and held another election at which other directors were duly elected, and this brings me to the consideration of the second leading and important issue in the cause.

2dly. Was the election held by Hamilton Harris and others acting as inspectors, and at which it is claimed that Charles Courter, Walter S. Church, and others were elected directors, a legal and valid election?

The fact is undisputed and indisputable that a stockholders' meeting was held in what is called the directors' room of said

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company, by a portion of the stockholders of the corporation, prior to the meeting so held in the hall of said building over which James Hendrick presided; that Walter S. Church was chairman of such meeting, and J. R. Herrick secretary; that Hamilton Harris, Joseph Bush and James Oliver were elected inspectors, that such inspectors immediately proceeded to the room called the treasurer's room in said building assigned for the purpose of the election, and opened a poll and proceeded to receive such votes of stockholders as were offered, and continued open said poll until one o'clock P. M., when they closed the same, canvassed the votes, and declared Walter S. Church and the twelve other persons named and voted for, on said ticket, duly elected directors of said corporation. It is also clearly established and undisputed that this stockholders' meeting was called to order and organized about fifteen minutes before twelve o'clock; and that the said inspectors, chosen at such meeting, proceeded to the treasurer's room to open the said poll, and took possession of the polling place, and declared that they came there to act as inspectors at about five or six minutes before twelve o'clock; and that about twelve o'clock, Colonel North, who moved the organization of such stockholders' meeting, moved a re-organization of that meeting, and that said inspectors be reappointed and proceed with said election. Upon the question whether the said inspectors actually received any votes before twelve o'clock, there is a conflict in the evidence.

The organization of this stockholders' meeting before twelve o'clock was obviously a surprise upon many of the stockholders entitled to attend and take part in such meeting.

The notice for the election fixed the time at twelve o'clock at noon, and there was no notice given or published of a stockholders' meeting for any other time, or for any other meeting of stockholders, except such as was involved in a notice of the election. There was nothing in such notice to apprise the stockholders that there was any occasion for their assembling before twelve o'clock, or that any other business

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was to be transacted except that of the election. So far, therefore, as this meeting and its acts are concerned, including the appointment of inspectors, I think there can be no doubt that there was surprise and fraud upon many of the stockholders, and, as against such stockholders as did not participate in such meeting, the same was irregular and void; all acts done by portions of the corporators, which bear the appearance of trick, secrecy or fraud, will be held invalid. (Wilcox on Corporators, 51.) Surprise and fraud upon part of the electors is ground for avoiding an election. This principle is asserted in many cases. (11 East, 77, *Rex v. Gaborian*; Grant on Corporations, 204; 11 Wend., 611, *People v. Peck*; 36 How., 108, *Matter of the Pioneer Paper Co.*) But it is claimed that the re-organization of the meeting at twelve o'clock cured this irregularity. This would doubtless be so if the new organization were a full, fair and open re-organization like a new meeting, and attended with no circumstances of deception or unfairness. If the meeting held before twelve o'clock had been entirely abandoned in all respects, and it had been announced that it was so abandoned, and the reasons for a stockholders' meeting had there been fully stated anew, and a new organization then had as of an original meeting, I should have no doubt that such new meeting would be a regular and valid one. But I think this rule will hardly apply in this case. The inspectors had gone to the treasurer's room and proclaimed themselves inspectors and had opened the polls and had proceeded to act as inspectors. They were not recalled. They did not abandon their places or positions and return to the meeting for a new lease of power, or renounce their claim to be inspectors, but kept their places, assuming to be inspectors, and claiming the right to receive votes, if they did not actually receive any before the moment of twelve o'clock arrived.

The resolutions passed at the reorganized meeting were not new resolutions prepared at the moment, but were resolutions previously prepared, and on their face assume the existence and continuance of an organized meeting and the

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previous appointment of inspectors. The resolutions of the new meeting are as follows :

“Resolved, That this meeting proceed with the annual election of directors and inspectors, with Walter S. Church as chairman, and Jonathan Herrick as secretary.”

And next—

“Resolved, That the annual election of the directors and inspectors proceed with Messrs. Harris, Bush and Oliver as inspectors in the place of Messrs. Hand, Lathrop and Haskell, ineligible and removed.”

It seems to me that if the case depended upon this point, I should be bound to hold that the reorganized meeting was in fact and in legal effect but a continuance of the first meeting. The first meeting did not break up. The chairman and secretary retained their seats at the table with their friendly stockholders, where they sat at the first meeting, and there was no abandonment of the room or a relinquishment of its pre-occupation by those who held the first meeting, and no formal organization of a new meeting in the ordinary way.

(It appeared that there was a discrepancy between the time kept at the company's ticket office and in the treasurer's room, and the time of the watches of those in the stockholders' meeting, at which Mr. Church presided, and at the election held by Hamilton Harris and his associate inspectors. The cause seemed to have been that the Fisk party sent a young man to the observatory, to get the true time; he returned and reported the time by his watch, as set by some person at the observatory, and most of the party set their watches by the time so reported. And the learned justice reviews the testimony, as to the correct time, and then proceeds as follows:)

It is thus, I think, quite evident that the reorganization was moved at least three minutes before twelve o'clock by the time in the treasurer's and ticket offices of the company, which, I think, was more to be relied on as the true time in the city of Albany, at that point of time, than the time reported by Wilber, as the observatory time, by his watch,

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set by a man he did not know and by a clock he did not see, which might be done mistakenly, and possibly deceitfully; for it appears that it required a change of most of the watches of the party, whose movements were regulated by the time so reported. If it were important or essential to the decision of the case, I should be inclined to hold that the time of the clock in the offices of the company, which regulated the running of the trains, and was, as Van Alstyne testifies, regulated daily by telegraphic communication with the observatory clock, should be held to be the true and proper time to regulate the proceedings of the stockholders at their corporate meetings, and should be considered as affording the true test for the determination of the actual time at the period in question, for the purpose of said election.

But the legality of this meeting, in its first organization, and its reorganization, and of the election held under its authority, was denied and contested on the trial and argument, in connection with these questions, chiefly upon the ground that it was part of a scheme or conspiracy, through the form of an election, for a minority of the stockholders of said corporation to obtain the control of said railroad by James Fisk, Jr., Jay Gould and others acting in concert with them, and in fraud of the just rights of the stockholders holding a majority of the stock of said company. It clearly appeared that from dissatisfaction, on the part of some members of the board of directors, with Mr. Ramsey, or other cause, early in the summer, in conjunction with Messrs. Fisk and Gould (Mr. Harris testified he was retained by Mr. Gould as counsel in the matter in June), efforts began by the purchase of stock, to prepare for a change in the directors of the railroad company at the coming election, to be held in September; and these efforts continued up to the 7th of August, the day for closing the transfer books.

This proceeding was entirely legitimate, proper and lawful. It is the law of joint stock corporations, that a majority of the stockholders in interest shall control in the election of its officers. and in its management.

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Besides these efforts in the purchase of stock, to get the control of the road at the ensuing election, proof was given at the trial to show that resort was had to various judicial proceedings, with the preconcerted design and intent to prevent an honest and fair election, by excluding votes that could not be controlled by the Fisk and Gould interest, and to hinder and prevent a free and true expression of the wishes of the other stockholders at such election, in respect to the future management and control of the said road.

It appears that up to the time of the commencement of this action, twenty-two different suits had been commenced and instituted by the different parties interested in this controversy. With those suits and proceedings, I have nothing to do in this connection, except as they preceded, related to, or were designed to affect, influence or control the election held on the 7th of September.

The first of the suits of this description was commenced by Joseph Bush, on or before the 3d of August, against David Groesbeck, Samuel Sloan, Samuel C. Thompson, Ossian D. Ashley, C. H. Dabney, J. P. Morgan and G. H. Morgan, Goodwin and Walter H. Burns. The complaint alleged that 3,000 shares of the stock of said company, had been illegally issued by Mr. Ramsey to said parties, in the month of December, 1868, and prayed that said stock be declared unauthorized and void, and be given up to be canceled; and the holders thereof be restrained by injunction from parting with, assigning, or in any way incumbering the said shares of stock by them respectively held; and that a receiver of said shares be appointed. In this suit an *ex parte* order was made in this court at a Special Term, held in New York, on the 14th of August, appointing William J. A. Fuller receiver of said 3,000 shares of stock. The parties above named were required to deliver the said shares to the said receiver, upon demand, and the said receiver was directed to take immediate possession thereof.

Upon the facts stated in the complaint in this action, I do not see why this injunction was not properly issued. The

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facts which existed and now appear that said 3,000 shares were issued by the express authority of the board of directors, upon valid contracts, for the benefit of the corporation, and was all valid stock owned by the corporation, acquired by forfeiture for the non-payment of calls made upon the subscriptions, were either unknown to, or were purposely suppressed by the plaintiff.

But the order for the appointment of a receiver *ex parte* must have been granted incautiously, and upon some mistaken oral representation or statement of the facts of the case, as it was in clear conflict with the law and settled practice of this court. In *Verplanck v. The Mercantile Insurance Company* (2 Paige, 450), Chancellor WALWORTH states the rule as follows: "By the settled practice of this court, in ordinary suits, a receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard in relation to his rights, except in those cases, where he is out of the jurisdiction of the court or cannot be found, or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party to prevent the destruction or loss of property." The same rule is reasserted by the chancellor in *Sandford v. Sinclair* (8 Paige, 374), and in *Gibson v. Martin* (*idem*, 481); and is asserted in numerous cases, among which are *Field v. Ripley* (20 How. P., 26); *McCarthy v. Peak* (9 Abbott, 166), and *Dowling v. Hudson* (14 Beavan).

In the case of *Verplanck v. The Mercantile Insurance Company* (*supra*), the chancellor also said that "in every case where the court is appealed to, to deprive the defendant of the possession of his property, without a hearing or an opportunity to oppose the application, the particular facts and circumstances, which render such a summary proceeding proper, should be set forth in the bill or petition on which the application is founded."

In this case, no facts are stated in the complaint calling for the immediate appointment of a receiver. It was not stated that the defendants were irresponsible, or that there

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was any danger of loss from the transfer of the stock, and upon the facts appearing on the trial, such allegations could not have been truly made; for the said defendants are rich men, and generally of abundant responsibility to account for the stock, if they had violated the injunction and transferred the scrip; and the plaintiff had not and did not pretend to have any title to the said stock or lien upon it, and had simply the rights of a stockholder of said company, if all the allegations in his complaint were true, to have judgment that the said scrip and stock be cancelled and surrendered.

But the facts clearly show that these 3,000 shares of stock were all valid stock. It was issued by the company, as before stated, by the authority of the board of directors, and composed part of an amount of forfeited stock owned by the corporation. By the forfeiture, the stock became the absolute property of the corporation, and might be sold at its value, and a proper stock certificate given therefor without any re-subscription. (*Otter v. Brevoort Petroleum Company*, 50 Barb., 247 and 255; *State Bank of Ohio v. Fox*, 3 Blatchford, 433; *City Bank of Columbus v. Bruce*, 17 N. Y., 512; *Small v. Herkimer Manufacturing Co.*, 2 Comstock, 337.)

As this stock was thus clearly valid stock in the hands of the defendants enjoined in that suit, and the order for the appointment of receiver not warranted by the facts, the prompt steps of the receiver in getting possession of this scrip, as he did from Groesbeck of 900 shares, by taking with him a sheriff's officer when he made the demand, and explaining the nature of a writ of assistance, intimating in effect that he or the officer had such writ, connected with the fact that he was at Albany on the said 7th of September, and voted on said 3,000 shares at the Harris poll, without any other title to the said stock or any transfer to him on the books or of the scrip, would seem to warrant the inference that this suit was instituted for the fraudulent purpose not only of getting possession of this scrip, and preventing the owners of it from voting upon it, against the interest of the Fisk party at the election, but also with the intent actually

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to vote upon it as valid stock, in opposition to the wishes of its owners, and in aid of the objects and interests of Mr. Fisk and his associates, in carrying the election of his set of directors.

The next fraudulent proceeding which seems directed to affect the election are the suits of David Wilbur, in one of which an injunction was issued restraining the defendant, Ramsey, from acting as president of said railroad company, which suit was followed by another suit on the next day, August 6th, in which Azro Chase was plaintiff, and the corporation and others defendants, in which an injunction was issued, and James Fisk, Jr., and Charles Courter, upon an *ex parte* application, were appointed receivers of said railroad. In pursuance of such appointment, it appears that the said James Fisk, Jr., and Charles Courter, immediately applied to the persons in possession of the office of the said railroad company in Albany, and demanded to be let into possession of said railroad as such receivers, and upon being refused such possession, attempted to take such possession by force from persons claiming to be in possession of such office and railroad, under the authority of Robert H. Pruyn, who also had been appointed a receiver of said corporation in a suit instituted in Albany county, wherein John W. Van Valkenburgh was plaintiff, and claimed to be in possession of its property as such receiver, under an order made by one of the justices of this court of the third judicial district.

The appointment of Fisk and Courter as receivers of the said railroad and its property and franchises, is obnoxious to the same objection made in the appointment of Fuller as receiver, in the suit of *Bush v. Groesbeck*, and following the suits above mentioned, it seems to me must have been applied for and procured (as it was *ex parte*) in order to affect the election by giving Messrs. Fisk and Courter the advantage of the immediate possession of the said road, and the control of its affairs, its books, papers and property.

The next judicial proceeding, which it is claimed on the argument was designed to affect the election, was the suit of

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Stanton Courter against the corporation and others, including Hand, Lathrop and Haskell, elected inspectors in the year 1868 for the year 1869. In this suit an injunction was issued restraining the said inspectors from acting as such, at said election, on the ground that they were not stockholders of the corporation.

The summons in this suit is dated New York, September 2, 1869. The venue in the action was laid in the county of Broome, in the sixth judicial district, and the injunction was granted by a justice of this court of the first judicial district, doubtless without knowing or having his attention called to the fact, that the place of trial of said action was in another district. The prayer of the complaint was, among other things relating to other defendants, that the said Hand, Lathrop and Haskell be restrained from acting as inspectors or from receiving or counting any votes at said election or at any election of officers of said company, and contained no other prayer for relief as against the said Hand, Haskell and Lathrop.

The by-laws, which required the inspectors to be stockholders of the company, had fallen into disuse, and had been disregarded by the continued election from year to year, by the stockholders of persons not stockholders for inspectors. The same persons had been chosen for the three previous successive years as such inspectors, without dissent or objection, and I much doubt whether said by-law was ever of any force or validity, and whether the directors could thus restrict the choice of inspectors. Clearly their election was not void. The election of an unqualified person to a corporate office is merely voidable and not void. (2 Kyd on Corporations, 9; *Crawford v. Powell*, 2 Burr, 1013; *Rex v. Bridge*, 1 Maule and Selwyn, 76.)

It seems to me quite clear that this injunction was improvidently granted, and that the officers of a corporation cannot be thus summarily removed from office by a court of equity. But it was doubtless the duty of the said inspectors to obey the injunction as they did. No allegation or suggestion is made in the complaint that the said Hand, Has

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kell and Lathrop, except that they were not stockholders, were not competent and proper persons to act as inspectors. The injunction appeared to have been signed by the judge who granted it on the 6th of September. The use that was made of this injunction is, I think, the more serious ground of objection to it. If it had been procured and served a day or two at least before the time fixed for the election, it could have done no particular injury, or created any special surprise to affect the election. It was in the possession of one of the attorneys and counsel acting for Mr. Fisk on the evening of the 6th of September. It was talked about in the meeting held the same evening at the Delavan House, by Mr. Fisk and his friends, and one of the resolutions drawn up for adoption at the stockholders' meeting, to be held the next day, stated that the inspectors had been enjoined, and the whole scheme of operations of Fisk and his party, for the next day, and the necessity for a stockholders' meeting, depended upon that fact, and the service of that injunction at the proper time, and pre-supposed such service. Mr. Shearman, the chief attorney for Mr. Fisk in this controversy, and the one who apparently chiefly directed the operations and movements of the Fisk party at the stockholders' meeting and at the election afterward, testified in respect to such service, and his movements in connection therewith, as follows:

"I set out for the offices of the Albany and Susquehanna railroad in a carriage, at about twenty minutes past eleven in the morning of that day. On my way there, I saw two inspectors of election, whose names I knew then, but cannot now recall, and I saw a gentleman serve them with a paper which I had given to him, and which included an injunction against their serving as inspectors on that day."

And he further said that he then went immediately to the office, and when he got into the directors' rooms it was about half past eleven.

The procuring and keeping back this injunction and serving it at the time and in the manner stated, was an obvious

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and designed surprise upon the great body of stockholders of the corporation. They had no reason to expect that said inspectors would be enjoined, and, therefore, had no occasion to assemble promptly to provide for the exigency created by their removal or declination to act, by the choice of new inspectors, in a stockholders' meeting. It cannot be considered otherwise than a scheme contrived and devised to take an unfair and improper advantage of the stockholders not in the interest of Mr. Fisk in respect to the conduct of the said election. It was suggested on the argument that a primary reason for objection to these inspectors and procuring of said injunction was, that the chairman of the board of inspectors, Mr. Hand, was one of the counsel for Mr. Ramsey. Apparently, this was a good objection, for it is quite important that inspectors of such elections where there is controversy and contest, should be impartial and disinterested men, for they act in part judicially as well as ministerially. But if it were a valid objection to Mr. Hand that he was counsel for Mr. Ramsey, I do not see why it was not equally a valid objection to Mr. Harris, who was a leading and most active counsel for Messrs. Fisk and Gould in this matter. And Mr. Bush (another inspector chosen to act with Mr. Harris) too, was deeply interested in the contest on the same side, being plaintiff in the suit instituted to procure the appointment of Mr. Fuller, receiver of the 3,000 shares of stock held by Groesbeck and others.

The next judicial proceeding designed to operate upon the election, as claimed by counsel on the trial, was the commencement of a suit in the name of the railroad company against Joseph H. Ramsey, Henry Smith and William L. M. Phelps, in which action an order for their arrest was obtained in the sum of \$25,000.

By whose authority this suit was commenced does not distinctly appear. It was, however, commenced by the same attorneys who had commenced all the previous suits for the parties acting in concert with or in furtherance of the interests of Mr. Fisk. . The order for their arrest was obtained on

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the 6th of September, and taken to Albany the same afternoon. The complaint was produced and proved on the trial, but by some mistake was not left with me; but I understand that the cause of action for which this order of arrest was granted was, that the defendants were charged with taking and carrying away from the office of the company certain books of the corporation. These books certainly belonged in the office of the company, and their removal could not be justified except upon the just apprehension on the part of the officers of the company that they were not safe in the office, and were there liable to be seized and taken away by force or fraud, and without right. They were, in fact, removed with the knowledge and assent of the president and treasurer of the company, and upon the advice of their counsel, on the evening of the 5th of August, the night before the attempt was made by Fisk and Courter to take possession of the said office, by force, as receivers.

On the morning of the 6th of August, it appears that Robert H. Pruyn was put in possession of the office of said railroad as receiver, and thereafter until the appointment by the governor of Robert L. Banks, on the 13th of the same month, as executive and financial agent, to take charge of the road and operate the same, as such receiver had the lawful custody of the books and papers of said corporation; and it appears that he was acting in concert and sympathy with Mr. Ramsey and the said officers and persons who took away the said books, and that Phelps, the treasurer retained under him, had access to the books and made entries in the same, from time to time, under the direction or authority of said Pruyn. The appointment of Mr. Banks as executive and financial agent, upon the request and stipulation signed by the parties, and delivered to the governor, gave him the right to the possession and control of the said books, and virtually superseded both receivers. So that when this suit was commenced, neither of these receivers were entitled to the custody of the said books, or to bring any suit for their conversion, or their non-delivery to the agents of the governor.

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The books were, in fact, returned to the office on the night of the 6th of September, and put under the control of Mr. Banks, so that when the suit was actually commenced, by the service of the summons and complaint, they were in the actual custody of the plaintiff, if the agents of the governor properly represented the corporation. Fisk and Courter, had clearly no right to bring the action as between them and Pruyn, who had been previously put in possession of the offices, under the order and authority of this court. Except for the appointment of Mr. Banks, as agent of the governor, the custody and control of these books, with all the other property of the corporation, had been assumed by this court, and committed to its receiver, Mr. Pruyn, and the authority of Fisk and Courter was in abeyance, at least, until the court, upon a proper application to it in the third district, had vacated the appointment of Pruyn, and directed the surrender of his trust, and the transfer of the property of the corporation to Fisk and Courter. Fisk and Courter, therefore, had no right to institute this suit in the name of the Albany and Susquehanna Railroad Company, and the order of arrest was unauthorized. But assuming it to be otherwise, the order to hold to bail in the sum of \$25,000, was most extraordinary and exorbitant, and must have been procured to be used, as it was used, on the day of election, in aid of the fraudulent purposes of Mr. Fisk and his associates. It was delivered to the sheriff of Albany, at about nine o'clock in the forenoon, of the 7th of September, with instructions to do his duty; and it seems, that he deemed it his duty to serve such order of arrest in person, and, as he says, at about fifteen minutes before twelve o'clock; just about the time the stockholders' meeting, held in the directors' room, was called to order by Colonel North. It also appears from the testimony of Mr. Ramsey, that he was detained, and held in custody about half an hour before he could get released by the execution, and acceptance of a satisfactory bail bond. The arrest of Mr. Ramsey and his counsel, Smith, and the treasurer, just at this juncture, could not have occurred, under the circumstances.

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without particular design. The sheriff testified, that he knew that the election pending was to take place at twelve o'clock; that Mr. Ramsey was prominently interested in that election; that Mr. Smith was prominently interested as counsel in the matter; and that all the defendants were well known citizens and residents of Albany.

This order of arrest, thus procured, and thus executed, could have no other object or purpose, on the part of those who instigated and directed it, than to hinder and embarrass Mr. Ramsey, and his friends among the stockholders, and prevent them from participating in the stockholders' meeting, and possibly in the election. Some difficulty was found, as it appears, in getting bail, and if it had not chanced that able and responsible bail had been soon obtained from persons in attendance upon the election, the defendants probably would have been unable to take any part in the election.

I come to the remaining branch of the evidence, tending to establish the fraudulent combination and conspiracy, imputed to Mr. Fisk and his associates, in respect to the stockholders' meeting held in the directors' room; I mean the pre-occupation of said room before the time fixed for the election, and by persons not stockholders of said company.

Mr. Herrick, the vice-president of the company, testified that the superficial area of the room called the directors room, deducting for table and desk, is 309 square feet, and that estimating three square feet for a man, the said room would hold 103 men. This estimate does not exclude chairs, and it appears that numbers were seated in chairs. It clearly appears, that this room began to be filled preparatory to this meeting, at about half past eleven o'clock.

Mr. Harris testified, that he went to the office of the railroad company at about half past eleven, accompanied by Mr. James Fisk, Jr., Judge Parker, and Mr. Field; that they arrived there soon after half past eleven, and went immediately to the directors' room, which they found about half full of men; that he recognized many persons in the room at the time they entered, and then came others he did not know

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Mr. Church testified, that he arrived at the room about twenty-one minutes before twelve o'clock; that he went directly to the directors' room, and found it partially filled with people, among them, some of our lawyers and inhabitants, and other parties residing on the line of the railroad, and parties connected with the road, and named twenty-eight persons then present whom he then recognized. It also appeared from the testimony of this witness, that a meeting was held at the Delavan House the evening previous (the 6th of September), composed of Mr. Fisk, Mr. Field, Mr. Harris, Mr. Herrick, Leonard, Sherman, and two or three other old directors of the Susquehanna road; that the subject of a stockholders' meeting, to be held the next day, was discussed, and who should be inspectors and officers of said meeting, was talked about, and it was understood, they should meet at the directors' room the next day at half past eleven.

It clearly appears, that after the arrival of Mr. Fisk and his counsel and friends among the stockholders, the room rapidly filled, and that when the meeting was called to order by Colonel North, at about fifteen minutes before twelve, it was quite full, and by twelve o'clock it was densely packed. And I think it is clearly established, that of the persons so filling and occupying said room, from fifty to sixty, at least, were imported, came, or were brought there upon the employment of James Fisk, Jr., or his agents, from the city of New York, who were not stockholders in said company; many of whom were of a rough, low class of men, such as in common parlance would doubtless be classed among the roughs and fighting men of that city. These men came together in a railroad car, and arrived in Albany early on the morning of the 7th, and were fed, and controlled, and taken to the said room under the lead of men confessedly acting in the employ of Mr. Fisk, and many of them furnished with proxies, that they might vote, as the counsel for Mr. Fisk avowed on the trial, at all *viva voce* votes that might be taken in the meeting.

The testimony of Mr. Hendrick seems to me, to give a

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fair representation of the actual condition of things in this room at, and before the time of the meeting there held. He testified, that he arrived at the said office at about half past eleven o'clock; that he went first to the directors' room; that it was then full, in the eastern part overflowing. I had, he said, great difficulty in getting to the front. He was asked, by what class of persons? and answered: "They were strangers to me, and the hardest set of men I ever saw in my life. I should think seven-eighths of them were of that character. The room was very full. I think any sensible number of men could not be crowded into the room in addition to the number there." Of these men, it appears forty-four, or forty-five were fed in the restaurant kept at the Union depot, in the northern part of the city, immediately on their arrival at Albany from New York, and their breakfasts paid for by some of the agents of Mr. Fisk. These men were then taken to another restaurant near by, kept by Joseph Clinton, to be furnished with proxies. He describes them as follows: "They were common laboring men; some of them dressed roughly, and some better. There were men in shirt sleeves, some with blue shirts and overalls. Some had their coats under their arms, and some had no coats."

Orange Stevens, a witness, called in behalf of the Fisk side of the controversy, testified that he was a passenger conductor on the Erie railroad; that he came up from New York on the same train with these men; that he gave about twenty of them proxies, in a restaurant, near the depot of the Susquehanna railroad. Another witness, Pollard, came from New York with these men, and gave some of them proxies in the office of the railroad, and some in the restaurant; saw them march into the room under the charge of four different persons, each having charge of a set or file of five or six of the men, and said the room was half full when they went in. The whole evidence upon this point, I think, fully establishes that this room at, and about twelve o'clock, was so fully packed with this description of men, with con-

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ductors on the Erie road, and other agents and retainers, employés of Mr. Fisk, or persons under his control, and acting in his interest, together with other persons comprising stockholders, friendly to Mr. Fisk, and others acting in concert with him, as utterly to exclude a large portion of the stockholders attending, and entitled to take part in a stockholder's meeting, at that hour, from access to said room, and preclude them from an open, free and fair, and safe participation in the proceedings of such a meeting. The importation, and crowding into a small room of such a class of men as I have described, and furnishing them with proxies, that they might participate in the proceedings of such meeting, and in the election afterward, was a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of the *bona fide* stockholders of the company, tending, if such proceedings are countenanced, and allowed by the courts, to convert corporation meetings into places of disorder, lawlessness, and riot; and it is doubtless due, considering the temper of the parties, to the vigilance of the Albany police, that this meeting did not end with violence and bloodshed.

Upon the whole evidence upon this branch of the case, I think I am bound to find, as matter of fact, that there was a preconceived scheme, combination, or conspiracy, to carry the election of directors, appointed to be held at the time and place aforesaid, by the use and abuse of legal process, and proceedings, and by efforts and contrivances to prevent a fair election of inspectors at a stockholders' meeting, made necessary by the injunction against the inspectors elected in 1868, procured, used, and served as above stated, with the concurring pre-occupation of the room where such meeting was to be held, with such number of persons as utterly precluded a free and fair meeting for such purpose.

And I am accordingly bound to find, as matter of fact, and of law, that the election held by Hamilton Harris, Joseph Bush, and James Oliver, acting as inspectors, was therefore irregular, fraudulent and void.

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There is still another subject for consideration in respect to this election. It was held in distinct violation and disregard of two injunctions, issued out of this court, and duly served upon the said inspectors. One injunction was issued in the suit of David Groesbeck, and others against Jay Gould, James Fisk, Jr., and others.

This injunction required the defendants, Hand, Lathrop, and Haskell, inspectors of elections, their successors, substitutes, and all and every other person, who might in any way be appointed or selected to serve as inspectors of elections, or to hold any election for directors of the Albany and Susquehanna Railroad Company, absolutely to desist and refrain until the further order of the court, at any election on the 7th day of September, 1869, or any subsequent day, whenever the plaintiff, and the other owners of 3,000 shares of said company should be enjoined, or they be forbidden to vote upon the same by any injunction, or order, or judgment or process, of any court; and they were also forbidden to receive any vote, or votes on the part of the defendants, Jay Gould, James Fisk, Jr., Charles Courter, Jacob Leonard, Samuel North, Azro Chase, David Wilbur, Alonzo Evarts, Jonathan Herrick, Joseph Bush, Hamilton Harris, and James Oliver, in person or by proxy, or as the proxy or substitute in anywise of any other person, unless the plaintiff and the other holders of said 3,000 shares of stock, and of every portion thereof, should first have an opportunity to vote upon all of the said shares, by them held respectively. This injunction was served upon Mr. Harris, and his associate inspectors, before they had received any vote, and was immediately disregarded, and disobeyed in letter and intent, by them, by receiving the vote of W. J. A. Fuller, who voted as receiver of the very stock upon which the plaintiffs in said action were restrained from voting. The other injunction was granted in a suit, in which Minard Harder was plaintiff, wherein, and whereby, the said inspectors were commanded to desist, and refrain from holding any election of directors, or from receiving and counting, and canvassing

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any votes thereof. This injunction, as well as the one directed to Hand, Haskell, and Lathrop, and the one forbidding Joseph H. Ramsey from acting as president of said railroad company, I think, were entirely void. I do not think a court of equity has any power to restrain a public officer, or an officer duly elected, or appointed, by a corporation, from performing the general, ordinary, and proper duties of such office. It may restrain him from doing some particular wrong or injury affecting private rights; and it may suspend, or remove a director, or trustee, of a private corporation upon due cause being shown, and due notice given, for any gross violation of duty or corruption in office, but it cannot remove him by injunction, without notice or without a hearing. But the first mentioned injunction issued or granted in the suit of David Groesbeck, and others, has been sanctioned in form and substance by the District Court of the United States, in the case of *Brown v. The Pacific Mail Steamship Company* (5 Blatchford, 525), and, I should think, was modeled after the injunction issued in that case. It was, I think, a valid injunction, and as such it was the duty of the inspectors to whom it was addressed to obey it. The writ of injunction is doubtless liable to abuse, and is unquestionably, often granted incautiously; but while a court with equity powers exists in this State, the process of injunction is an invaluable, an indispensable instrument in its hands to enable it to discharge its proper duties, and to prevent wrongs and injustice, and it must be maintained in its integrity, and obedience to it required and enforced.

In *The People v. Sturtevant* (5 Selden, 263), Judge JOHNSON, in giving the opinion of the Court of Appeals, said that "the principle is of universal force, that the order or judgment of a court having jurisdiction, is to be obeyed, no matter how clearly it may be erroneous. It is only when it acts without authority, that its orders are regarded as nullities; they are then not voidable but simply void."

This election would doubtless have been set aside on a summary application to this court, pursuant to § 5 of title 4

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of chapter 8, of the Revised Statutes, part first, on the ground that it was held in distinct violation of this injunction; and I think in this proceeding, where the regularity of the election is in question, the fact that said election was held in violation of an injunction, must be considered.

As upon the grounds above stated, I have come to the conclusion, that the election of the Courter and Church set of directors was and is not legal and valid, it follows that the priority of right, depending upon the prior organization of the stockholders' meeting, over which Walter S. Church presided, is removed, and such meeting is to be regarded in law, as if it never had been held; the consequence of which, upon the views above stated, is that the stockholders' meeting, over which James Hendrick presided, was the only regular, legal and valid stockholders' meeting, held on the said 7th of September; and that the inspectors elected at that meeting were lawful inspectors, and the election held by them for directors of said corporation, a legal and valid election.

The argument that Harris, Bush and Oliver were officers *de facto*, and the election held by them is valid upon that ground, is untenable. There can be no such officer as an officer *de facto*, as against the people, in an action at the suit of the people to try the title to the office. The doctrine in respect to officers *de facto*, only applies to, and in favor of third persons, and to protect innocent parties who have trusted to the apparent title of an officer. (*Ex parte Wilcocks*, 7 Cowen, 402; *Boardman v. Halliday*, 10 Paige, 223; *People v. Albertson*, 8 How., 363; *Weeks v. Ellis*, 2 Barb., 325.)

These views would seem to make it unnecessary for me to go further in the examination of the great mass of evidence, given and received in the cause. Much of it was given and received, upon the assumption that I might find it necessary to order a new election, and in that event I must determine, who would be entitled to vote at such election.

But as the court, in this class of questions, will seek to

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subserve, as far as compatible with the law of the case, the interests of the corporation and, for that purpose, will look to see how the interests of the majority of the stock are to be affected by its decision, I will proceed to state my views in regard to a few of the questions litigated and discussed in respect to this question.

It appears that at the Harris poll, there were cast 13,400 votes, and at the Snow poll, 10,742. Transfer the 2,500 shares improperly voted upon by Fuller from the Harris to the Snow poll, and it would give the majority to the latter poll. From the Harris vote, 1,100 should also be deducted, because the vote was given by commissioners, who had previously been removed from office, and their places filled by new officers. The *certiorari* brought to review the proceedings, did not restore the old officers, and they had no right to cast the vote of the town. Three hundred shares should also be deducted for the town of Duanesburgh, on the ground that this court at General Term had adjudged that said town did not own any stock in said railroad corporation, and was not a stockholder. Without going further into detail on this question, I will simply state that the subscription for the 9,500 shares by Hendrick, Hunt and others, I think, made them lawful stockholders upon such stock of the said corporation. They paid the ten per cent upon it, and cannot avoid the payment of the balance due upon such subscription. The company has had the ten per cent, and the subscription was made in the regular subscription book in the hands of the officers of the company, and created an absolute legal obligation, to take the stock and pay for the same. (*Black River and Utica R. R. Co. v. Clarke*, 25 N. Y., 208; *Ogdensburgh R. R. Co. v. Wolley*, 1 Keyes, 120.)

The votes upon this stock would have given a great preponderance to the Ramsey set of directors on a single poll. It seems to me quite clear then, that if there had been a single poll, and the stockholders had voted, and their votes been received according to the stock ledger and transfer books, as they stood on the 7th of August, including all such entries

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and transfers of stock as the treasurer did make or was bound to make, and which he would have been directed by mandamus to make, if he had refused, the ticket headed by J. Pierpont Morgan, would have been elected by a large majority of the votes of legal and valid stock.

And if, on the contrary, the result had been otherwise, and such result had been brought about by the reception of the votes given by Fuller, and the rejection of the votes of the true owners of that stock, and the reception and rejection of other stock illegally, including the 9,500 shares subscribed for by Hendrick, Hunt and others, this court would have been bound, upon summary application, to set aside such elections. (*Downing v. Potts*, 3 Zabriskie, 66; *Ex parte Murphy and others*, 7 Cowen, 153; 19 Wend., 635, in the matter of *Chenango Mutual Insurance Co.*)

The defendant, Jonathan R. Herrick, was not lawfully removed from his office of director by the common council of Albany. At the meeting of said common council, it appears that but one member of the board voted for his removal, and one member voted in the negative, and the presiding officer declared the resolution carried. This was clearly an error, and said Jonathan R. Herrick remains, and is a lawful director of said railroad company, for the city of Albany.

Judgment must, therefore, be given according to these views, adjudging that the Fisk set of directors were not duly elected, and that the Ramsey set were duly elected, and are the legal and lawful directors of said corporation; and further adjudging that the people recover costs in the action against the corporation, the Albany and Susquehanna Railroad Company; and that the complaint be dismissed as against the defendants, Jonathan R. Herrick and Walter H. Burns, without costs, and that all proceedings in the suits mentioned in the pleadings, be perpetually enjoined and restrained, and that the same be discontinued by the plaintiffs on both sides, without costs, and the receiverships of Pruyn, Courter and Fisk be vacated and set aside.

The judgment will further direct that the thirteen defend-

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ants, who are hereby declared to have been duly elected directors of said corporation, headed by J. Pierpont Morgan, and also the defendants, David Groesbeck, Daniel T. Chamberlain, John W. Vincent, Daniel Morrell, Dewitt C. Falis, James M. Boyd, Samuel Sloan, Samuel C. Thompson, Martin Green, recover their costs of this action against the said thirteen defendants, headed by Charles Courter and Walter S. Church, whose claim to have been duly elected directors of said corporation, is hereby disallowed. It will be referred to the Hon. SAMUEL L. SELDEN, of Rochester, to pass upon the accounts of the receiver, and upon a hearing of the parties at Albany, to ascertain and report to the court what would be a proper extra allowance in the action, and to which of the defendants it should be paid, and to settle such other matters of detail as may be necessary to carry the judgment into effect.

And it will be further ordered, that the said directors, so held to be duly elected, be let into immediate possession of said railroad, and that the receiver transfer to them all the property and assets in his hands, belonging to said corporation, retaining from the moneys in his hands, all proper allowances for fees, expenses, and other charges to be adjusted by said referee.

In conclusion, I regret that other duties forbid the devotion of greater time and reflection to the examination and decision of this most important cause. It came, an exotic to this district, where the judges are full of labor, and where the people have no interest in the controversy, except such interest as all good citizens feel in the welfare of the State, and in the maintenance of law, order and good government. It is impossible that any judge could enter upon the trial of a cause of such magnitude, without a deep sense of oppression, from the weight of the great responsibility involved in its decision. Including the time consumed in its trial, and required for the examination of the case, it has occupied a month of my time, and diverted me from my particular local duties. My duty is now discharged, and a sense of relief arises from the fact that my decision is not necessarily conclusive upon the parties,

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and, if I have erred in judgment or opinion, the error is not irreversible.

WILLIAM DE FOREST MANICE and BENJAMIN C. WETMORE, in their respective individual capacity, and as executors of the last will and testament of DE FOREST MANICE, deceased, Respondents, v. CATHARINE MARIA MANICE et al.

Same v. DE FOREST GRANT et al., and two other cases.

(GENERAL TERM, FIRST DISTRICT, NOVEMBER, 1869.)

The residuary clause of a will gave the rest, &c., of the estate, real and personal, to executors in trust, to collect the income and apply the same, during the life of the testator's widow, to certain specified purposes; and upon her death, all said estate, except a house, of which it directed a sale, was to be appraised by three persons; one to be chosen by the executors, one by the surrogate of the county of New York, and a third by the persons so selected; and the aggregate amount of such appraisal, together with the proceeds of the sale of such real estate, and all other assets then belonging to the testator's estate, was to be divided into twelve equal parts, which were to be distributed as further provided.

The said clause also provided for the conveyance and transfer of three of the twelfth parts to the testator's son, to whom said parts were given; or in case of said son's death, to his then living lawful issue; with the like provision for another son; and, also, in case of the death of either of said sons, prior to such division, leaving no lawful issue living at the time of such division, then the surviving son, or in case of his death, his lawful issue, to take the share of the deceased son.

The said clause also provided that, as to two of the remaining twelfth parts of said residuary estate, the executors were to retain and hold the same (and said parts were given and devised to them accordingly and were to include certain specified real estate at the appraised value; the residue, to be made up of personal estate at the appraised value), in trust to pay over the net income to the use of the testator's daughter during life; and after her death, or after the time of said distribution, in case she should have previously died, to divide the said two twelfth parts into as many shares as there might be children of said daughter living at her decease, and to retain one of said shares for each of said children, and accumulate the net income during the minority of such children respectively, and to pay the same to them at their majorities, with the accumulations, no further

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provision being made respecting the vesting of said shares, in the event of the death of the testator's daughter before the division, with like provision for two other daughters respectively.

Held, That the clause intending to vest the *corpus* of the residuary estate in the executors, as trustees, to hold and carry from and after the death of the widow, to the time of the distribution, was *pro tanto* void, as suspending the absolute ownership and power of alienation thereof beyond the period permitted by the Revised Statutes.

That the gifts, to the testator's sons and to his son's issue, were both contingent, neither of them being intended to vest before the actual division of the residuary estate, and that they were void in their creation.

That the ulterior executory gifts of the other half of the residuary estate, were also contingent and void in their creation.

That the directions for appraisal, division, conveyance, &c., could not be, considered powers in trust for partition; but that the plain intent of the whole residuary clause was, that the executors should, on the testator's death, take, hold and carry the *corpus* of the residuary estate, until the directed division of it and its directed or implied accumulations, after the death of the widow and after the directed appraisal should actually take place.

The said clause also first provided for the disposition, by the executors, of the net income of the said residuary estate given to them in trust, after payment of annuities to the testator's widow and mother, in the payment of an annuity to each of the testator's children, during the life of said widow, and the application of the surplus to the *pro rata* payment of certain legacies bequeathed in previous clauses of the will; and if after such payments there should be a further surplus, the same was to be divided into two parts; one of which parts was to be invested, and to accumulate during the life of the widow; and the other to be subdivided into eighteen parts, of which six were to go to the widow; three to each of the testator's sons, and two to each of his daughters.—*Held*, that in addition to an unlawful accumulation of the one-half of such surplus during the life of the widow, the directions for payment of annuities to the testator's children during the widow's life, and for the payment to said children of the eighteenth parts of the surplus income (required also to be made during the life of the widow), no provision being made for disposition of the said children's annuities, and the said eighteenth parts, on the decease of said children, with or without issue, before death of the widow, until after the widow's death, were made in view of the whole clause, with the intention by the testator, that on the happening of the latter event (the decease of his children, with or without issue, before his widow), the said eighteenth parts of the surplus income appropriated to, and the said annuities of, said children, should fall under the provisions of the residuary clause, and accumulate until the distribution therein provided for.

That if the trust were valid, as vesting in the trustees the residuary estate till the death of the widow, as the testator's children might

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die before the widow, the testator's mother being dead, the trust might become a trust for receiving annually the income of the residuary estate, for the purpose of paying thereout the provisions for the widow, and for paying the remainder of the income to whoever might be entitled, on the theory that the testator had not made any valid testamentary disposition of it; as it could not be lawfully accumulated under the express and implied trusts for accumulation, and there was no person entitled, under the will, to any eventual estate in the subject of the trust to whom it could go under 1 R. S., 726, § 40.

That the provision did not warrant the view that the testator intended, on the death of either daughter without issue, before the division, that his heirs at law should take any vested estate in said two twelfths.

An express, active trust of real estate may be invalid and void by the Revised Statutes, though it may not, if valid, unlawfully suspend the absolute power of alienation of the subject of it.

And it seems, in case it had been provided, that on the decease of either of the testator's children leaving issue, before his widow, the trustees should apply, &c., or pay over to said issue thereafter, during the life of the widow, the like annuity and part of one-half of the surplus income, the child so dying had received, or was to receive; the trust could not have been held valid.

It seems also, the trust to receive, &c., and pay over to the testator's children during the life of his widow was invalid.

And assuming the purpose of the trust as to the widow to have been lawful and authorized; and whether the purpose of the trust for the testator's children were lawful or not; in view of the contingencies, and difficulties, to which the feature of the trust scheme last mentioned exposed it, and its connection with the express and implied purposes of unlawful accumulations, the impossibility of saying that the trustees as such under the trust, as a trust vesting in them the whole residuary estate during the life of the widow, could lawfully hold the whole of it, and receive the income of the whole of it, for the purpose of paying over a small part of the income to the testator's widow and children under the trust scheme, and the balance of it to the testator's heirs-at-law and next of kin, as undisposed of by him; and considering, also, the intended entirety of the *corpus* of the residuary estate during the life of the widow, and until the directed division of it with its accumulations; and the impossibility, without the exercise of arbitrary discretion, of determining as to what part or how much of the residuary estate the trust scheme should be deemed valid, as vesting an estate in the trustees as such, *pro tanto*, for the lawful purposes of the trust during the life of the widow; and considering the invalidity and voidness of the ulterior and executory dispositions of the residuary estate, with its accumulations, with a view to which ulterior and executory dispositions it was to be presumed the first part of the trust scheme during the life of the widow, with its express and implied trusts, for accumulations of income, was framed.—*Held*, the whole trust scheme must fail, and in respect to his

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residuary estate, which the testator intended to dispose of by such residuary clause, he must be deemed not to have made any valid testamentary disposition thereof, or of its accumulations, unless the intended disposition and purposes could be carried out, through or by the execution of the trust directions or powers, viewed only as powers in trust.

Held, further, that the trust provisions, so far as they might be considered powers in trust, failed also.

Held further, that notwithstanding the failure of directions to pay them out of the income of a certain portion of the testator's estate, general legacies bequeathed in previous clauses of the will, were payable out of the general assets in the hands of the executors as executors; and that a bequest expressly payable out of the trust residuary estate, on the death of the widow, did not abate by the failure of the trust scheme, and might be viewed as a general pecuniary legacy, and paid, or its payment, on the death of the widow might be provided for, out of the general assets; and so, also, taxes, &c., on premises given to the widow for life; but otherwise, as to the annuities, and further gifts out of the income of the trust residuary estate, which were presumptively given on the theory, that the testator supposed he was making valid disposition of all his residuary estate.

Held, further, that the widow's annuity having abated, any election by her to take the provisions of the will in lieu of dower, should not impair or affect her right thereto in the residuary real estate.

One of the testator's daughters being deceased intestate, having died after the testator, and while a resident of Connecticut, and leaving a husband and children surviving her; and said husband having obtained letters of administration in New York, and being a party to actions for construction of the will, &c., before the court for determination, and plaintiff in one of said actions, and it appearing, that by the law of Connecticut, he was entitled to a life estate only in the personal estate of his deceased wife, and her children to the remainder.—*Held*, security should be required of him before such estate should be placed in his hands.

A legacy being given to the treasurer of Yale College, for the trustees thereof, with directions for investment and accumulation, for educational purposes, it was held that the bequest should be paid, and that the question, whether the fund could be administered, and interest accumulated as directed, must be determined by the courts of Connecticut.

THESE cases came before the General Term, on appeals from a judgment entered at a Special Term.

The judgment declared the construction of a will made by De Forest Manice, deceased. It annulled a part thereof as void; but established its principal trusts and dispositions, and gave directions for carrying them into execution.

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The following is a statement of the important provisions of the will:

Interbracketed words are inserted to abridge the statement or to develop the evident meaning.

* * * * *

Second—I give my wife my city residence and stable for life.

* * * * *

Sixth—I give unto my two sons [particularly described], lots of land in the city of New York, during their respective lives. In case either die, no issue, him surviving, the survivor shall have the share of the one so dying, during his life.

Upon the death of either leaving [such] issue, such issue shall take, in fee-simple, the share of the one so dying. In case but one shall die, leaving [such] issue, then, upon the death of the last survivor of my two sons, such issue shall have [all the] lots in fee-simple. In case of the death of both, leaving no [such] issue, then, upon the death of the last survivor, said lots shall vest in my heirs-at-law, as if I [had] died intestate.

I authorize my sons, and the survivor of them, to make leases of said [lots] for any term not exceeding twenty-one years, at such rent as they shall see fit; and [with] covenants of renewal for any further term not exceeding twenty-one years, at a rent to be ascertained and fixed by appraisement, in the usual way, upon condition that the lessee or lessees shall build, etc.

* * * * *

Thirteenth—I give to Susan T. Walker \$3,000.

Fourteenth—I give to Margaret Olmstead \$3,000.

Fifteenth—I give to Eliza De Forest, Sarah De Forest and Mary Cannon \$1,000 each; and I direct that the legacies given in this and in the 13th and 14th clauses, be paid, *pro rata*, as fast as the net income of my residuary estate will allow, after paying the \$16,200 per annum, as hereinafter directed.

Sixteenth—The residue I give unto my executors in trust: To keep invested the personal property, or the proceeds

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thereof; and in case of the sale of any real estate, as herein after provided, to invest the proceeds thereof in the same manner; to let or lease the real estate, or any part thereof, during the lifetime of my wife, for terms not exceeding five years; to sell any or all my real estate, not herein specifically devised, at such time or times as they shall deem beneficial and advantageous to my estate; and to receive the rents and interest of said residuary real and personal estate, and to apply the same during the lifetime of my wife, as follows:

To pay all taxes, assessments, and Croton water rents, and for premiums of insurance, and keeping my improved property in ordinary repair, and all other necessary expenses in the management of my estate; and to apply the net residue of the income as follows:

To pay my wife \$8,000 per annum, in quarter-yearly payments, commencing from the day of my death, during her natural life.

To pay to my mother \$700 per annum, in quarter-yearly payments, from the day of my death; and I order and direct my said mother to pay \$100 of said annuity, annually, to her sister, Sarah Marks.

To pay to each of my children \$1,500 per annum, in quarter-yearly payments, during the lifetime of my said wife.

If, by any disaster, the said net annual income of my residuary estate shall fall below \$16,200, the aggregate, etc., such deficiency shall be taken off from the annual allowance to my children, *pro rata*, until their respective allowances shall be reduced to \$1,000 per annum; and any further deduction shall be taken from the allowance to my wife.

In case the said annual income shall exceed \$16,200, then out of such surplus are to be paid, *pro rata*, the legacies in clauses 13th, 14th and 15th.

And in case there shall still remain a surplus of said income, the same is to be divided into two parts, one of said parts to be invested, and to accumulate during the lifetime of my said wife; and the other part to divide into eighteen parts, and to pay six of said eighteen parts to my said wife, three of said

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eighteen parts to each of my said sons, and two of said eighteen parts to each of my said daughters.

And upon the further trust, upon the death of my said wife, in case the legacies given in the 13th 14th, and 15th clauses shall not have been paid in full; to pay what shall remain unpaid thereof out of my estate; and also to pay thereout the sum of \$5,000 over to the treasurer, for the time being, of Yale College, in New Haven; which sum I request the trustees of said college to invest in city or State of New York securities, or upon bond and mortgage on productive real estate in the city of New York, and accumulate the interest until the principal and interest shall amount to the sum of \$30,000, and thereafter use and apply so much of the interest of said fund, when required so to do, as will educate continuously one person, who shall bear my paternal name and be a lineal descendant of mine, in all their courses, collegiate and scientific.

And upon the further trust, upon the death of my said wife, to cause to be appraised by three competent persons, one to be chosen by my executors, one by the surrogate for the county of New York, and the third by the two so chosen, all my residuary personal estate and the securities in which the same shall be invested, and also all my residuary real estate (excepting that hereinbefore specifically devised to my sons [and wife]), and to sell the house and stable [devised to the wife for life]; and the aggregate amount of such appraisals of such personal and real estate, and proceeds of the sales of such real estate, and all other assets then belonging to my estate, to divide into twelve equal parts; and, in case it shall become necessary for such division, to convert into cash any such personal estate or securities as they may see fit, and the proceeds of such sales to stand in the place of the appraised value of such securities in making up the amount of the personal estate.

And upon the further trust, to convey, transfer, and pay over to my son, William, in fee-simple, to whom I give the same, or in case of his death, to his then living, lawful issue,

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three of said equal twelfth parts ; which said three parts, so to be conveyed to him or to his issue, shall include the following real estate [specially prescribed] at the value at which the same shall be appraised, as aforesaid, the same to be free from incumbrance ; and the residue to be made up out of the personal estate at the appraised valuation aforesaid.

And upon the further trust, to convey, transfer and pay over to my son, Edward [precisely as in William's case, certain other real estate, the same being specially described].

, In case either of my sons die prior to such division, leaving no lawful issue living at the time of such division, then my surviving son, or in case of his death his lawful issue then living, shall take the share of the deceased son.

And upon the further trust, to retain and hold, as trustees, under this my will, and I give, devise and bequeath the same to them accordingly, two other of said equal twelfth parts ; which shall include the following real estate at the value at which the same shall be appraised as aforesaid, that is to say : [specially describing certain real estate], and the residue to be made up out of the personal estate at the appraised value aforesaid ; in trust to keep invested the personal property ; to let or lease the real estate, and receive the rents thereof, and after paying taxes and assessments, and expenses for repairs, insurance, and other incidental expenses, to apply the net income of said real and personal estate so held in trust, half yearly, or as the same may be received, to the use of my daughter, Mary C. Lockwood, for and during her natural life ; and after her death, or after the time of said distribution, in case she shall have previously died, to divide the said two twelfth parts into as many shares as there shall be children of my said daughter living at her decease, and to retain one of said shares for each of said children, and to accumulate the net income thereof during his or her minority, and on his or her arrival at the age of twenty-one years, to pay him or her the same, with its accumulations ; provided, however, that in case either of said children shall, during his or her minority, be in need of any portion of said income for his or her support, my said

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trustees are authorized to apply the same; and provided that in case of the death of either leaving lawful issue; and in case of his or her death, during minority, without leaving lawful issue, then such share is to be paid to the survivors of said children. And in case of default of issue of my said daughter, then to convey, transfer and pay over the said two twelfths to my heirs-at-law, in such shares and proportions as, by the present laws of the State of New York, they would take and inherit real estate of which I died seized and intestate.

[Here follow provisions in the same precise terms for each of the other two daughters and her issue, the only difference being in the specific real estate thrown into each portion.]

Providing, however, that in case either of my said daughters shall die unmarried, and without leaving lawful issue her surviving, [her] appointment disposing of [her aforesaid] share [shall be effectual].

And in case, at the time of such division, there shall remain unsold any vacant lots of land, and my said executors shall deem it more beneficial for my children, that the same be divided among them rather than sold, then I authorize such remaining vacant lots to be appraised as aforesaid, and to be apportioned among the shares aforesaid, in the same manner as their proceeds would have been apportioned by virtue of this my will, had the same been sold; such of said vacant lots as shall be allotted to my daughters, to be subject to the trusts hereinbefore named, with power to the trustees to sell the same whenever they shall see fit, and to invest the proceeds on bond and mortgage on productive real estate in the city of New York.

Seventeenth—In case my mother shall survive my wife, then I charge the annuity given to my mother, upon the shares of my residuary estate given to my sons, and I order and direct that they pay the same to her, quarter-yearly, during her natural life.

Eighteenth—I declare that what I have given to and for my wife, are to be taken by her in lieu of dower.

And I further declare, that the provisions for my said

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daughters are not to be subject to the control or interference or liabilities of any husband either of them may at any time have.

And wherever I have devised or bequeathed to the issue of any child of mine, such issue, if more than one, if standing in different degrees of relationship to such child, are to take by representation.

Nineteenth—I hereby appoint * * * * executors and trustees of this, my last will and testament ; authorizing them to compromise with any or all of my debtors, and to submit to arbitration any and all disputes or controversies which shall or may arise in the settlement of my estate ; and I further authorize them, in case of the damage or destruction by fire, of any building or buildings on any of my property, either prior to the division, or such as they shall hold in trust after such division, to rebuild the same ; and in case the amount received upon the policy or policies of insurance shall not be sufficient for that purpose, to use any funds belonging to the estate, if such damage or destruction shall occur prior to such division, or any funds belonging to the particular trust, if the same shall occur after such division ; and in case such fund shall not be sufficient, then to execute and deliver to any person or persons, or body corporate, who will loan the same, a mortgage upon the premises upon which the building or buildings so damaged or destroyed were situated, for an amount which shall be sufficient to complete and finish such building or buildings.

Chas. O'Connor for the executors, and *William De Forest Manice*, and *Edward A. Manice*.

Marshall S. Bidwell, for *Frances I. M. Smith*, and *J. Tuttle Smith*.

Edwin W. Stoughton, for *Caroline A. Grant* and *Gabriel Grant*.

Wm. Henry Arnoux, for *Wm. B. E. Lockwood*, administrator, &c.

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Wm. R. Darling, guardian *ad litem*, for Chas. M. Grant, and De Forest Grant.

Charles F. Sanford, guardian *ad litem*, for Manice D. F. Lockwood, Buckingham Lockwood, and Wm. B. E. Lockwood, Jr.

Geo. Wm. Wright, for F. N. Dodge, guardian *ad litem*, for B. M. Smith.

Chas. H. Tweed, for the president, &c., of Yale College.

Present—CLERKE, CARDOZO and SUTHERLAND, JJ.

By the Court—SUTHERLAND, J. It may be said that these actions were all brought for the purpose of having the construction, force and effect of the will of De Forest Manice judicially declared.

They were all tried together, and one judgment was rendered in all the cases. The case comes before the General Term on appeal, by certain defendants, from the judgment.

The testator died in this State, domiciled therein, April 18, 1862, leaving real estate of about the value of \$1,400,000, and personal, exceeding in value \$200,000, and leaving Catharine Maria, his widow, and his children, William De Forest Manice, Edward Augustus Manice, Mary C. Lockwood, then the wife of William B. E. Lockwood, Caroline A. Manice, now the wife of Gabriel Grant, Frances I. Manice, now the wife of James Tuttle Smith, his only next of kin and heirs-at-law. Mary C. Lockwood was married, in this State, in 1856, in the lifetime of her father, and shortly after her marriage, removing to the State of Connecticut, with her husband, she became, with him, a domiciled inhabitant of that State, and continued so until she died, the 10th of March, 1869, intestate, leaving her husband, William B. E. Lockwood, and three children, Manice De Forest, and Buckingham, born in the lifetime of her father, and William B. E. Lockwood, Jr., born since his death, her surviving, and since her death, letters of administration of

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her goods, &c., have been issued to her said husband, by the surrogate of the county of New York.

The other two daughters of the testator have been married since his death, Caroline A. to Gabriel Grant, and Frances I. to James Tuttle Smith. Caroline A. has two children, and Frances I. one child.

Eunice Manice, the mother of the testator, to whom a life annuity is directed to be paid in the sixteenth clause of the will, died in October, 1863.

The value of the real estate disposed of by the will, otherwise than by the sixteenth clause, exceeds \$500,000; the value of the other real estate left by the testator exceeds \$900,000.

The money legacies given by the 9th, 10th and 11th clauses of the will, in the aggregate, amount to \$700.

By the 12th clause a legacy of \$100 is given to each of the testator's house servants.

The legacies mentioned in the 9th, 10th, 11th and 12th clauses are directed to be paid within three months after the testator's decease, and are the only money legacies mentioned in or given by the will which are not directed to be paid out of the income of the trust residuary real and personal estate, mentioned in the 16th clause of the will.

I infer from the proofs in this case, and the ninth finding of fact, that the income of the residuary real and personal estate mentioned in the 16th clause of the will and purporting to be thereby disposed of, was sufficient to pay the annuities or payments thereby directed to be paid during the life of the testator's widow, and also to pay the money legacies directed to be paid by the 13th, 14th and 15th clauses of the will, amounting in the aggregate to \$9,000; and that the aggregate of the surplus income of such residuary estate for the second, third, fourth, fifth, sixth and seventh years after the death of the testator, after paying the annuities or annual payments directed to be paid by the 16th clause, during the life of the widow of the testator, amounts to the sum of \$220,000, one-half of which is by the 16th clause directed to be, and it is to be presumed has been, invested for accumulation.

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It does not appear that the testator left any debts.

I have deemed the foregoing statement material but sufficient for stating intelligibly to any one who has read carefully the will, and especially the long and somewhat complicated 16th clause of the will, the material questions presented by the appeals, my conclusions, and the grounds of them.

The most important of these questions relate to the 16th clause of the will, and of these the most important and difficult are not so much questions of construction, as questions whether the plain intention of the testator can lawfully be carried out, or carried into effect.

By the 16th clause the testator gives, devises and bequeaths to his executors and the survivors and survivor of them, all the rest, residue and remainder of his estate, real and personal, of every kind ; to collect and receive the rents, issues, income, dividends and interest thereof, and apply them during the lifetime of his widow.

1st. To the payment of taxes, &c.

2d. To the payment to his widow of \$8,000 per annum, in quarterly payments, during her natural life.

3d. To the payment to his mother of \$700 per annum, in quarterly payments.

4th. To the payment to each of his children of \$1,500 per annum, in quarterly payments, *during the lifetime of his widow.*

5th. In case the annual income should exceed \$16,200, the aggregate of the annuities, or annual payments, to be paid to his widow, mother and children ; then,

6th. To pay out of such surplus income the legacies given in the 13th, 14th and 15th clauses of the will, and if there should still remain a surplus of money, then,

7th. The same is to be divided into two parts, one of which is to be invested and accumulated during the lifetime of the widow, and the other to be divided into eighteen parts, six of which are to be paid to the widow, three to each of his sons, and two to each of his daughters.

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On the death of the widow, whatever may remain unpaid of the legacies given in the thirteenth, fourteenth and fifteenth clauses, is to be paid, and also \$5,000 to the treasurer, for the time being, of Yale College; and then the sixteenth clause declares the further trust, that upon the death of the widow, all the residuary personal estate, and the securities in which it shall be invested, and all the residuary real estate, except the house and lot No. 156 Madison avenue, and stable and lot 21 East 33d street (given by the second clause of the will, to the widow for life), shall be appraised by three persons, one to be chosen by the executors, one by the surrogate of the county of New York, and the third by the two so chosen; that the house and lot No. 156 Madison avenue, and the stable and lot 21 East 33d street, shall be sold and conveyed in fee simple, and that the aggregate amount of such appraisals of such personal and real estate, and of the proceeds of the sales of such real estate, and all other assets then belonging to the testator's estate, shall be divided into twelve equal parts.

The sixteenth clause then declares the further trust, that three of such equal twelfth parts, which said three parts shall include, *at its appraised value*, certain real estate, specifically described, shall be conveyed, transferred and paid over to his son, Wm. De Forest Manice; or, in case of his death (before the time of such distribution), to his *then living* lawful issue; and the testator gives, devises and bequeaths the same to his said son, or in case of his death (before such distribution), to his *then living* lawful issue.

The sixteenth clause then declares precisely the same trust, and has precisely the same provisions as to three other of said equal twelfth parts intended for his son, Edward Augustus, or in case of his death before the time of such distribution, for his issue *then living*; which three parts are to include certain other real estate, specifically described, *at its appraised value*.

Then follows this provision:

“And in case of the decease of either of my said sons prior to such division, leaving no lawful issue living at the time of such division, then my surviving son, or in case of his death,

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his lawful issue, then living, shall take, receive and inherit the share of the deceased son."

The declaration of trusts and provisions in the sixteenth clause, which then follow, as to two of said equal twelfth parts, intended to be disposed of contingently for the benefit of each of the testator's three daughters and their children, are more complicated, but the declarations and provisions as to each two parts, are in terms and effect precisely the same, the only difference being in the specified real estate included in the several two parts.

Look at those relating to the two parts intended contingently for the benefit of the testator's daughter, Mary, and her children.

The testator in effect, by them, attempts to create a new and contingent future active trust, as to such two parts, to commence and take effect *not on or from the death of his widow, but after her death upon and from the actual division of his residuary estate directed to be made after the appraisal.*

In the first instance, the testator in effect, upon and after the actual division, gives the two parts which are to include certain real estate, specifically described, at its appraised value, to his executors in trust for the use and benefit of his daughter Mary during her life; but then follows these words:

"And after her death, *or after the time of said distribution, in case she shall have previously died,* to divide the said two twelfth parts into as many shares as there shall be children of my said daughter living at her decease, and to retain one of said shares for each of said children, and to accumulate the net income thereof, during his or her minority; and on his or her arrival at the age of twenty-one years, to pay him or her the same, with its accumulations."

Then follow certain provisions, directing in case a child of his said daughter should die, leaving issue, the payment of such child's (testator's grandchild's) share to such issue; and in case of his or her (testator's grandchild's) death during minority, without lawful issue, directing the payment of such

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child's (testator's grandchild's) share, to the survivors of the children of such daughter; and in case of default of issue of the testator's said daughter (after her death without issue and *after the directed division of the residuary estate*), directing the said two-twelfths to be conveyed, transferred, and paid over to the testator's heirs-at-law in such shares, &c.

I deem it important to say, though in case of the death of the testator's daughter, Mary, before the time of distribution, the direction is to divide the two parts into as many equal parts as she left children living at the time of her decease; yet that I cannot find any gift to such children, or provision for them, before the time of distribution. I cannot find any words, or provisions which show that the testator intended, if his daughter, Mary, died before the directed division of his residuary estate, leaving children, that such children should take, or have, on the death of their mother, any vested estate or interest in the two parts, or any estate or interest, unless they survived the division of the residuary estate.

Perhaps the most peculiar feature of the sixteenth clause is, that by it, the ulterior disposition of the whole residuary estate, real and personal, with its accumulations (except so far as the bequest of \$5,000 to the treasurer of Yale College. to be paid out of it, and the direction then to pay out of it, whatever may then remain unpaid of the legacies given in the thirteenth, fourteenth and fifteenth clauses, may be viewed as a disposition of a trifling portion of it), is postponed until after the death of the widow, and after the directed appraisal of it, and until the directed division of such residuary estate, with its accumulations actually takes place.

With the trifling exception aforesaid, there cannot be found in the sixteenth clause of the will, any gift or disposition of any part or share, or interest, vested or contingent, undivided, or otherwise, of such residuary estate, or of its accumulations, on the death of the widow.

It is plain, that the testator intended and expected, that by the sixteenth clause, his executors, as trustees, should and would, on his death, take, hold and carry, the *corpus* of all his resi.

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duary estate, with its directed or implied accumulations (except as aforesaid), until the directed division of it, with its accumulations, after the death of his widow, and after the directed appraisal, actually took place.

It is plain, if the trust scheme of the sixteenth clause of the will is valid, *as vesting in the executors as trustees*, the *corpus* of the residuary estate, to hold and carry after the death of the widow, and until its actual division, that the *corpus* of the residuary estate will be thereby made inalienable after the death of the widow, and until the division actually takes place. (1 Rev. Stat., 729, § 60; 730, §§ 63, 65; *Hawley v. James*, 16 Wend., 121, 122; *Coster v. Lorillard*, 14 Wend., 303, &c.; *Hawley v. James*, 5 Paige, 445; *Williams v. Williams*, 8 N. Y., 531; *Harris v. Clark*, 7 N. Y., 242.)

I think it is plain, that neither the absolute power of alienation of the residuary real estate, nor the absolute ownership of the residuary personal property, could in this case lawfully be suspended from and after the death of the widow to the time of the distribution or actual division. (See 1 R. S., 723, §§ 14, 15; 1 id., 773, §§ 1, 2, and the cases before cited.)

If so, it follows that the trust scheme as vesting, or intending to vest, the *corpus* of the residuary estate in the executors as trustees, to hold and carry from and after the death of the widow, to the time of the distribution or actual division, is *pro tanto* void.

It would be sufficient to say in this case, on this point, that the actual division of the residuary estate directed in the sixteenth clause, *may not* take place at the termination of the life of the widow. But the children of the testator and their children may all die before the widow, and the directed division cannot be made for sometime after the death of the widow.

And it can be said further, that it is plain that it cannot be made as directed in the sixteenth clause of the will, for an indefinite period after the death of the widow, and that such period is not measured or limited by the existence of a life or lives in being at the death of the testator.

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The appraisal is directed to be made upon the death of the widow ; and if it is ever made as *directed and required*, it will take time.

The house and lot 156 Madison avenue, and the stable and lot 21 East Thirty-third street, are to be sold and conveyed by the trustees after the death of the widow, and not before, and this will take time.

The division of the aggregate of the appraisals and of the proceeds of the sales of the house and lot, and stable and lot, and of all the other assets, cannot be made until after the appraisal and the sales of the house and lot, &c., and may take considerable time.

The drafter of the trust scheme, in the sixteenth clause of this will, I think had no right to assume, as he probably did assume, that any one whose duty it might be to pass judicially upon the question of the validity of it, could and would consider the ulterior dispositions of the equal parts of the residuary estate by the appraisal, resulting from the actual division, as taking effect, or intended to take effect, on the death of the widow.

I cannot ignore the fact, that these executory dispositions, if they ever take effect, as vesting an estate or interest, cannot so take effect for an indefinite period after the death of the widow, nor until the actual division.

I cannot ignore the fact, that the words and provisions of the sixteenth clause of the will, relating to these executory dispositions, are to the effect, that if they ever take effect, as giving vested rights or interests, they must so take effect at the time of distribution, or of the actual division, and not on the death of the widow.

If it should be assumed that the surrogate would willingly and promptly choose an appraiser, and that the appraisal would be made within a reasonable time after the death of the widow, and that the division would be made within a reasonable time after the appraisal, yet how can a transaction which is to take place in a reasonable time, or some time *after* the

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death of the widow, be considered as taking place on her death?

The estate of the trustees under the trust prior to the division, if they took any, could not be called a future estate, nor, perhaps, can a trust be called a condition or limitation within 1 Rev. Stat., 723, §§ 13, 14, 15; 773, § 1. But these provisions of the Revised Statutes declare a rule of public policy, and a trust which, if valid, will cause a suspension of the absolute alienability of property in conflict with the rule and with the policy of the rule, must be void.

I would say further on the question as to the validity *pro tanto* of the trust scheme, as vesting the residuary estate in the executors, as trustees, to be held and carried by them after the death of the widow, till the directed actual division, that the Revised Statutes do not authorize an express trust of real estate *vesting an estate in the trustee*, that the trustee may convey it to, or divide it among, devisees. (1 R. S., 728, § 55; 1 R. S., 729, § 58; *Boynton v. Hoyt*, 1 Denio, 53; *Hawley v. James*, 16 Wend., 114; *Lang v. Ropke*, 5 Sandf. S. C. R., 363.)

But perhaps the most destructive feature of the sixteenth clause of the will is, that the executory dispositions of the residuary estate, on and after the directed actual division of it, if valid, must necessarily suspend the absolute right or power of disposition of the *corpus*, or capital of the whole of it, from the death of the testator, during the lifetime of the widow, and after her death for an indefinite period, and until the actual division of it shall take place.

I think I have shown that such suspension would be illegal; and therefore, these executory dispositions must all be declared void, void "*in their creation.*" (See the provisions of the Revised Statutes and cases before referred to.)

The executory gifts to the sons and to their issue, are plainly contingent.

Look at the wording of the gifts to the testator's son, Edward Augustus, "or in case of his death prior, &c., to his *then* (that is time of distribution or actual division) lawful issue." The gifts are so worded, as to be, in effect, a gift to

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the son, *if* he survives the actual division ; or if he does not, then a gift to such issue of his that he may have left, as survive the actual division.

The gifts are not to the son ; and in case of his death before the actual division, leaving issue, to his, or to such issue. Had this been the gift, or the wording of the gift, it might possibly have been said, that the son, on the death of the testator, took, and has a vested estate or interest in the subject of the gift, or a vested right to the subject of it, liable to be defeated by his death before the actual division. But if he so took and has such vested estate, interest or right, it can only be defeated by the gift to his issue taking effect and vesting on the son's death before the actual division, leaving issue ; but the gift to the issue cannot vest *then*, for the gift to the issue of the son dying before the division, is to the issue of such son, *living at the time of the actual division*, and not to the issue of such son, living at the decease of such son. In effect, the gift to the issue, is a gift to such issue as live till the actual division.

The further provisions relating to the gifts to both sons and their issue, to wit : "And in case of the decease of either of my sons, prior to such division, *leaving no lawful issue living at the time of such division*, then my surviving son ; or in case of his death, his lawful issue, *then* living, shall take," &c., would seem to leave no room for doubt, that the executory gifts to the testator's son, Edward Augustus, and to his issue, are both contingent, that neither can vest before the actual division of the residuary estate. These gifts are, in fact, alternative executory gifts or limitations, which, at common law, would have been called executory gifts or limitations, contingent in a double aspect ; that is, the gift to the son is contingent, and the gift to the issue of the son is contingent.

I shall assume that it cannot be necessary to show, if both are contingent, that, if valid, they must necessarily suspend the absolute alienation of the subject of them, until the actual division of the residuary estate.

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And I shall assume, that I have shown, that such suspension would be illegal.

It follows that these contingent alternative executory gifts, or limitations, must be declared void ; void in their creation.

(See the provision of the Revised Statutes and the cases before referred to.)

Of course, all that has been said of the contingent alternative executory gifts to the testator's son, Edward Augustus, and his issue applies to the contingent alternative executory gifts to his other son, and his issue.

The ulterior or executory dispositions of the other half of the residuary estate, on and after the directed actual division, I think, are also all contingent, and therefore invalid and void ; void in their creation.

If the daughters survive the division, their shares or parts, are to pass under a new active trust for their lives, and contingently afterward for the minority of issue.

If either daughter dies before the division, leaving issue, I have already said in substance, that I cannot find words or provisions expressly or impliedly giving any vested estate, interest or right to such issue, on the death of the daughter so dying, or before the division.

In default of issue of either daughter, the two twelfth parts disposed of contingently in the first instance, for her and her issue, are to go to the heirs-at-law of the testator.

But either daughter might die without issue, before or after the division.

The provisions relating to the executory dispositions of the half of the residuary estate, intended contingently for the benefit of the daughters and their issue, are complicated and perplexing.

As the result of a careful consideration of them and of the general evident scheme of the sixteenth clause of the will, I must say, I do not think, that the testator intended, if either daughter died before the division without issue, that the testator's heirs-at-law should on her death, and before the division, take any vested estate or interest in the two twelfth parts dis

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posed of contingently in the first instance, for the benefit of such daughter and her issue.

The scheme of the sixteenth clause of the will is, for the executors as trustees, on the testator's death, to take, hold, and carry the *corpus* of the residuary estate with its accumulations, and the testator's estate and interest in the *corpus* of the residuary estate, till the directed actual division should take place.

And this scheme is evidently inconsistent with an intention that any one other than the trustees, should take or have under the will a vested estate or interest therein before such division should take place.

Had undivided estates or interests in the residuary estate, been so limited on the death of the widow, as to *then* vest, such estates or interests, though undivided, would of course have been alienable on their so vesting; and the subsequent trust powers, or directions as to the appraisal, division, conveying &c., might have been viewed as trust powers for partition, not calling for any estate or interest in the trustees; the validity or execution of which, as such, could not have suspended or affected the alienability of the residuary estate.

But considering that the executory dispositions are of twelfths of the aggregate of the *appraisals*, and yet as to the realty, dispositions of parts or pieces thereof specifically by description at their appraised value, which realty, thus specifically disposed of, is expressly excepted from the trust power of sale, it would seem that it might have been a difficult task to have so worded these dispositions, *retaining the character or description of the subjects of them*, as to have allowed vested estates or interests under them before the actual division.

I hesitated in suggesting further, that the event, that is the actual division of the residuary estate as directed by the testator, on which the executory dispositions are limited, is also contingent, inasmuch as the surrogate of the county of New York might decline to choose an appraiser, and the testator could not impose upon the surrogate a private trust duty out-

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side of his official duties, the performance of which could be enforced ; but I really do not now see any answer to the suggestion.

Of course, if the *event* on which the executory dispositions are limited is contingent, they cannot vest until the contingent event happens, and the absolute inalienability of the residuary estate must be suspended until the contingency happens.

I assume, it does not necessarily follow from the invalidity and voidness of all the intended ulterior or executory dispositions of the residuary estate, or from the invalidity *pro tanto* of the trust as vesting the residuary estate in the trustees, to hold and carry under the trust after the death of the widow, till the directed division of it might actually take place, that what may be called the first part of the trust scheme, during the lifetime of the widow, either cannot be, or should be, sustained for such purpose or purposes of it, as may be lawful.

It is conceded, that the express trust for the accumulation of one-half of the surplus income, after the payment of certain legacies during the life of the widow, is unlawful and void.

But I think the first part of the trust scheme impliedly calls for the accumulation of much more of the income in certain contingencies.

The annuities of \$1,500 each, payable to the testator's children out of the income, are payable in terms *during the life of the widow* ; not during the life of the child.

So also the eighteenth parts of one-half of the surplus income after the payment of the annuities and certain other legacies, payable to the children, are payable during the life of the widow, and not during the life of the child.

All the children (at the time of the execution of the will or of the death of the testator), might and probably would survive the widow ; and if they should, their annuities and parts of the surplus income, would have been paid to them, during the life of the widow.

But all the testator's children might die before the widow,

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each leaving issue, or neither leaving issue. In case of either of the testator's children dying before the widow, leaving issue, I find nothing in the will expressly or impliedly authorizing the payment to such issue, or to any one for such issue thereafter till the death of the widow, of the annuity and parts of the surplus income which the child so dying, leaving issue, would have received, had he or she survived the widow. Nor in case of either child of the testator dying before the widow, without leaving issue, do I find anything in the will expressly or impliedly authorizing the payment to the surviving widow and children, or any or either of them, or any one else, thereafter, till the death of the widow, of the annuity and parts of surplus income, which such child so dying without issue, would have received, had he or she survived the widow.

I think it fair to infer, considering the whole trust scheme, that the testator intended and expected, if either of his children died before his widow, leaving issue, or without leaving issue, that the ceasing thereby of the payment of his or her annuity and parts of the surplus income, should and would increase the surplus income annually thereafter till the death of the widow, for accumulation, by precisely the amount of income, which, as annuity, &c., he or she would have received annually, had he or she survived the widow.

It follows, if the trust is valid as vesting in the trustees the residuary estate till the death of the widow, as all the testator's children may die before the widow, and as the testator's mother is dead, that the trust may become a trust for receiving annually the income of the residuary estate (now probably \$100,000 or over), for the purpose of paying thereout to the widow the annuity of \$8,000, and six eighteenth parts of one-half the surplus after paying her annuity, and for paying the remainder of the income to whoever might be entitled to it on the theory that the testator had not made any valid testamentary disposition of it; for it could not lawfully be accumulated under the express and implied trusts for accumulation; nor could it go under the provision of the Revised

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Statutes (1 R. S., 726, § 40), the intended ulterior and executory dispositions of the residuary estate, and of its intended accumulations being invalid and void, and there being no person or persons, *under or by the will*, entitled to any "eventual estate" in the subject of the trust.

Again, had the testator expressly provided in case of the death of either child before his widow leaving issue, that the trustees should apply to the education or support of such issue, or pay over to such issue, thereafter, till the death of the widow, the like annuity and parts of one-half of the surplus income, the child so dying had received, or was to receive, it would have been impossible to say, that the trust as to such issue, was authorized and valid.

It is impossible to say, that the Revised Statutes authorize an express active trust of real estate vesting an estate in the trustee, to receive the rents and profits of lands, and apply them to the education or support of A. B., or to pay them over to A. B. during the life of C. D., and in case of A. B.'s death, leaving issue living, C. D. to apply the rents and profits to the education or support of such issue, or to pay them over to such issue, till the death of C. D.

The words of the provision of the Revised Statutes are: "To receive the rents and profits of lands, and apply them to the education and support, or either, of any person during the life of such person, or for any shorter term, subject," &c.

The words "any person" mean one person, as the subsequent words "such person" conclusively show; and the words "during the life of such person or for any shorter term," mean during the life of such person or for any shorter term, which must expire within the life of such person.

To hold that the words "of any person during the life of such person or for any shorter term," mean of such person, and of any number of issue of such person, during the life of *another person*, would be taking greater judicial liberty with the words and plain meaning of the provision than I am willing to take or sanction. An express active trust of real estate may be invalid and void by the Revised Statutes,

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though it may not, if valid, unlawfully suspend the absolute alienation of the subject of it. This proposition, the truth of which is so palpably and conclusively shown by several sections or provisions of the Revised Statutes relating to trusts of real estate, as not to permit without just cause of rebuke, a suggestion to the contrary, would seem accidentally to have been overlooked in one or more reported cases. (See *Gilman v. Reddington*, 24 N. Y. R., 9.)

It is even difficult to say, that the trust to receive, &c., and to apply, or pay over, &c., is valid as to the testator's children.

The provision of the Revised Statutes evidently means, that the life or shorter term during which the rents, &c., may be received and applied, or paid over, shall be the life of the beneficiary, or a shorter term than *his or her* life. (*Downing v. Marshall*, 23 N. Y. R., 377.)

The trust in question as to the testator's children, is in effect, to receive, &c., and to pay over, &c., during the life of the widow, or for a shorter term than her life; for as to such of the children of the testator as survive the widow, the rents, &c., will have been received, &c., during the life of the widow, and as to such of the children as do not survive the widow, the rents, &c., will have been received, &c., for a shorter term than the life of the widow.

I assume that the purpose of the trust as to the widow is lawful and authorized, and I do not say that the purpose of the trust as to the testator's children is unlawful and unauthorized; but whether it is or not, considering the contingencies and difficulties to which the feature of the trust scheme last considered exposes it, its intimate connection with the express and implied purposes of unlawful accumulations, the impossibility of saying that the trustees, as such under the trust, as a trust vesting in them the whole residuary estate during the life of the widow, can lawfully hold the whole of it, and receive the income of the whole of it, for the purpose of paying over a small part of the income to the testator's widow and children under the trust scheme, and the balance of it to

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the testator's heirs-at-law, and next of kin as undisposed of by him; and considering, also, the intended entirety of the *corpus* of the residuary estate during the life of the widow, and until the directed division of it with its accumulations, and the impossibility, in this case, without the exercise of arbitrary discretion, of determining as to what part or how much of the residuary estate the trust scheme shall be deemed valid as vesting an estate in the trustees as such, *pro tanto* for the lawful purposes of the trust during the life of the widow; and considering the invalidity and voidness of the ulterior and executory dispositions of the residuary estate with its accumulations, with a view to which ulterior and executory dispositions, it is to be presumed the first part of the trust scheme during the life of the widow, with its express and implied trusts for accumulations of income was framed; I think the trust scheme should not be sustained as vesting in the trustees, as such, the residuary estate, or any part or portion of it, or any estate or interest in it, for any or either of the declared purposes of the scheme during the life of the widow; and the ulterior and executory dispositions being invalid and void, and the law not allowing the trustees to hold and carry the residuary estate from and after the death of the widow, under the trust as vesting it in them till the division for the purpose of dividing and conveying and transferring it as directed, as I think I have before shown; it follows, that my conclusion is and must be, that the testator died intestate as to his residuary estate, which he intended to dispose of by the sixteenth clause of his will, and without having made any valid testamentary disposition thereof, or of its accumulations, except so far and in such particulars as the intended dispositions and purposes of the sixteenth clause of the will can and should be carried out through or by the execution of the trust's directions or powers, viewed only as powers in trust.

The ulterior and executory dispositions on the directed division being void, the preliminary directed appraisal and the directed actual division, and the execution of the con-

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veyances, or transfers, directed thereon, would be idle ceremonies for aught I can see. The conveyances, or transfers, if executed under the direction or power to convey, viewed as a power in trust, could give or convey no estate or interest, certainly as to the real estate, to the grantees or transferees *as such*. Moreover, if one is permitted to suppose what could not be, that such grantees or transferees could and would take the residuary estate under conveyances or transfers, made under the power or direction to convey, &c., viewed as a power in trust, as grantees or transferees under the conveyances or transfers, and not as devisees and legatees under the will, I do not see but the power to convey, viewed as a power in trust, would suspend the absolute alienation of the residuary estate till the actual division of it, and be void, as a power in trust, for that reason.

The power to sell and convey the house and lot, and stable and lot, given to the widow for life, was given for the purpose of having the proceeds of the sales divided, transferred and disposed of with the other residuary property. As the purpose cannot be carried out, but fails, the power should fall or fail.

I need not, probably say, that as to the residuary real estate, to hold, though the testator did not succeed in or by the sixteenth clause of his will in vesting in the trustees, as such, the residuary estate, or any estate or interest therein, yet that they might collect and receive the rents and income of the residuary estate, and pay them over or apply them so far as they lawfully could, under or according to trust scheme under trust to receive, &c., and to pay over, &c., as powers in trust, would be inconsistent with the purpose and policy of the provisions of the Revised Statutes authorizing and regulating certain express and active trusts of real estate, and abolishing all other trusts of real estate vesting an estate in the trustees.

Lord COKE says: "What is land but the rents and profits thereof?" It has over and over again been held that a devise of the rents and profits of land is a devise of the land itself. It would defeat the purpose of the provisions of the Revised

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Statutes referred to, to hold that under a trust scheme like this, the trustees could collect and receive, and pay over the rents, profits, &c., on the theory that the naked legal title, or legal estate in fee, descended to the heirs-at-law without the rents, issues, and profits, leaving them to be collected and received, and paid over under the trust powers or directions, viewed as powers in trust.

The power to let or lease, during the life of the widow, any part of the residuary real estate for terms not exceeding five years, and the power to sell any of such real estate *not specifically devised in the sixteenth clause*, and other trust directions and powers relating to the management of the trust property, its insurance, repairs, the payment of taxes, assessments, &c., were all plainly given as auxiliary, or subsidiary, to the trust scheme as vesting an estate in the trustees, as such, with a view to the ulterior dispositions, and should fail or fall, with the scheme as vesting such estate, and with the ulterior dispositions.

The mother of the testator is dead, and it is presumed that the legacies given in the thirteenth, fourteenth and fifteenth clauses of the will have been paid. But neither the mother's annuity, nor these legacies, though directed to be paid out of the trust income of a certain part of the testator's estate (that is the residuary), would have abated or failed in consequence of the failure of the trust fund or income out of which they were payable. Notwithstanding the failure of the directions to pay them out of the income of a certain part or portion of the testator's estate, they could and would have been viewed as general pecuniary legacies, and as such payable out of the general assets, in the hands of the executors, as executors.

So also, I think, the bequest to the treasurer of Yale College, in the sixteenth clause of the will, though expressly payable out of the trust residuary estate, on the death of the widow, does not abate by the failure of the trust scheme, and may (if otherwise valid), be viewed as a general pecuniary legacy, and paid, or its payment, on the death of the widow

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may be provided for, out of the general assets. (*Walton v. Walton*, 7 John. Ch., 258; 2 *Williams' Executors*, 839, 1046, and cases cited; *Boys v. Williams* 2 Russ. and M., 689; *Giddings v. Seward*, 16 N. Y., 367; *Shep. Touchstone*, 433; *Amb.*, 310; 4 *Ves.*, 565; 3 *Ves. and Bea.*, 5.)

So also, I think, the taxes and assessments, of or on the premises given to the widow for life, should and can be paid (or their payment provided for) by the executors, as executors, out of the general assets, notwithstanding the failure of the trust scheme, and of the trust fund, out of which they are directed to be paid.

But this cannot be said of the annuities and further gifts out of the income of the trust residuary estate to the children and widow, during the life of the widow. These cannot be viewed and paid as general pecuniary legacies, out of the general assets; for it must be presumed that they were given on the theory, that the testator supposed he was making, by the sixteenth clause of his will, valid dispositions of all residuary estate, and it cannot be supposed that he would, in view of the results of his not making by that clause of his will a valid disposition of any part of it, have made these provisions for his widow and children.

From the views which have been expressed, it follows that the testator should be deemed to have died intestate as to his residuary estate, real and personal, and its accumulations of income, and without having made any valid testamentary disposition thereof, or of any part or portion thereof, in or by the sixteenth clause of his will, otherwise than as the payment of legacies or moneys directed to be paid in that clause, which may be viewed as general pecuniary legacies, and paid as such out of the residuary personalty, viewed as assets, vested in the executors as such, for administration, may be regarded as dispositions by that clause, of portions of the residuary personalty; and that the rights, estates or interests of the parties to these actions, to or in the residuary estate, and its accumulations of income, should be declared and adjudged to be on

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the theory that the testator did die intestate, as to the residuary estate and its accumulations.

As the annuity to the widow abates, any election she may have made, to take the provisions of the will for her, in lieu of dower, should not impair or affect her right to dower in the residuary real estate.

I understand that the laws of the domicil of the testator, control his testamentary dispositions of personal property, and that in cases of intestacy, the laws of the domicil of the intestate, declare the succession, and right of succession to his undisposed of personal property, and that the "*lex rei sitæ*" controls testamentary dispositions of real estate, and declares and regulates the succession, and right of succession to it in cases of intestacy.

It follows, that the share of the residuary estate, real and personal, and of its accumulations of income (assuming all the residuary real estate to be in this State) which Mrs. Lockwood was entitled to, on the theory aforesaid, was by the laws of this State; that the rights, estates, or interests of her children, as her heirs-at-law, and of Mr. Lockwood, as her surviving husband, in or to her share of the residuary real estate, are, by the laws of this State; that the property, rights and interests of her children, as her next of kin, or otherwise, and of Mr. Lockwood, as her surviving husband, or otherwise, to or in her share of the residuary personal property, are by the laws of Connecticut.

But Mr. Lockwood's right to reduce into his possession his late wife's share of residuary personal estate, as being her administrator by New York letters of administration, and as such right could only be enforced by him, as such administrator, through the New York courts; and as he is a party to these actions as such administrator, and sole plaintiff in one of them, as such, which may be viewed as in part to enforce such right of reduction, as such administrator, and as the law of Connecticut is in proof, showing that by such law he is entitled only to the use, interest and profits of his late wife's share of the residuary personal estate during his life, and that on his

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death, her children will be entitled to the principal of it absolutely, I am not willing to say, that the judgment in these actions should not provide for securing to her children their future rights in or to the principal of her share of the residuary personal estate, before it shall be transferred or paid over to him, as such New York administrator. I think such security may be required, without violating any established principle of comity between States.

So far as I have knowledge of recent legislation, the rights, estates and interests of Mrs Lockwood's children, as her heirs, and of Mr. Lockwood, as her surviving husband, in or to her share of the residuary real estate, are by the general provisions of the Revised Statutes regulating descents, and the act of March 20, 1860. (Laws of 1860, 159, § 11.) What their rights may be before the legislature adjourns, no one can tell.

So much of the accumulations of income as came from the residuary real estate, should be regarded and treated as real estate; and so much of the accumulations of income as came from the residuary personal property, should be regarded and treated as personalty.

The proceeds, and investments of proceeds, in the hands of the executors resulting from sales of residuary real estate under the power of sale, in the sixteenth clause of the will, should be regarded and treated as real estate.

The legacy of \$5,000 to the treasurer, for the time being of Yale College, on the death of the widow, viewed as a general pecuniary legacy, payable out of the assets generally, though the trust scheme fails, I think is valid, so far as that the direction to pay the money to the treasurer, &c., can, and ought to be complied with. Whether the fund can be administered, and the interest of it accumulated, as directed by the testator, for the purpose specified by him, I shall regard as a question for the courts of Connecticut. If they shall determine that the fund cannot be so administered, and the interest accumulated by the laws of Connecticut, it is to be presumed that they will direct the fund to be paid over to whoever, under the circumstances, may be entitled to it.

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The gifts of certain real estate to the two sons and their issue, by the sixth clause of the will (except so far as revoked by the codicil, as to a part or portion of the subject of the gifts), is valid.

So, also, is the gift of certain real estate to the three daughters and their issue, by the first item of the codicil.

So, also, is the devise to testator's two sons and his grandson, of certain real estate by the second item of the codicil.

I am not aware of any question presented by the appeals, which has not been passed upon.

I have not been able to see that *Amory v. Lord*, or *Harrison v. Harrison*, have much, if anything, to do with the questions relating to the sixteenth clause of the will, or with the question, whether the trust scheme, or any part of it, can or should be sustained.

The views above expressed call for very material and extensive modifications of the judgment of the Special Term.

The order or judgment of the General Term modifying that judgment, according to the views expressed in this opinion, may be drawn by the guardian *ad litem* for the minor children of Mrs. Lockwood, or by either of the counsel for the testator's daughters, and settled on notice.

The costs of all parties on this appeal should be paid by the executors, out of the accumulations of income.

I think it right to say in conclusion, that this will was evidently drawn by an intelligent lawyer, who had read the Revised Statutes, and knew the meaning of words, for a persistent client, who was determined to have his own way, by paying for it; and though the examination of the questions relating to the sixteenth clause of the will, has cost me some labor, yet I have the charity to wish, if the lawyer who penned and worded the sixteenth clause of this will, should ever pen or word another like it, that it may never be his judicial duty, to say whether it, or any part of it, is valid, under or by the Revised Statutes.

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WILLIAM H. ASPINWALL v. DANIEL TORRANCE, EDWARD M. HOPKINS, HENRY HOPKINS, ROBERT L. CUTTING, ABRAHAM B. BOYLES, CHARLES MORGAN, GEORGE L. SCHUYLER, GUSTAVUS A. LACCHI, EBENEZER G. BURLING and CHARLES GOULD, impleaded with ALBERT C. RAMSEY, and others.

(GENERAL TERM, FIRST DISTRICT, JANUARY, 1870.)

A stockholder, who has been compelled to pay the debt of his corporation, may have an action for contribution against the remaining stockholders who were originally liable with him for the same.

So held, where the stockholder had been charged under the provisions of the "Act for the incorporation of companies formed to navigate the ocean by steamships" (Laws of 1852, chap. 228, p. 302), which, in certain events, impose upon the stockholders a several liability for the corporate debts.

The equitable doctrine of contribution explained and enforced.

One who has induced an agent to go beyond his powers, and enter into a contract unauthorized by his principal, cannot hold such agent personally liable upon the contract. Per INGRAHAM, J.

It seems, an agent exceeding his authority, but acting in good faith, where the facts are known to both parties, is not personally liable upon a contract so made for his principal.

And it seems, where an agent pretends to act for his principal, in making a contract, knowing he has not authority therefor, he is not liable upon the contract, but upon a warranty of his agency.

T. as agent for V., had taken from R. a pledge of stock, to secure a note executed by the latter to V.; T. then agreed with R. to take the stock in payment of the note which he thereupon gave up to R., and there was no transfer of the stock, but T. retained the certificates; T. had, in the latter transaction, exceeded his authority and his principal repudiated the purchase.—*Held*, error to charge T. in an action against stockholders for contribution, as the equitable owner of said stock.

A defendant adjudged in an action against him to be the owner of stock, is not estopped by the judgment from denying his ownership in an action against him by another plaintiff.

And it seems a judgment from which an appeal is pending is not a final judgment by which the parties are prevented from disputing the facts adjudged therein.

APPEAL from a judgment entered on the report of a referee.

Plaintiff brought the action as a stockholder of "The Mexican Ocean Mail and Inland Company," on his own behalf, and

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that of all other stockholders of such company, who might come in and contribute to the expense of the action, which was for a dissolution of the company, &c., and to compel contribution by the defendants, as the stockholders who were liable originally with him, toward the payment of certain judgments recovered against him by judgment creditors of the company. The defendant, Torrance, and several others answered, denying their liability, &c.

It appeared that "The Mexican Mail and Inland Company" was duly incorporated under "the act for the incorporation of companies formed to navigate the ocean by steamships," passed April 12th, 1852; the certificate of association being filed with the clerk of the county of New York January 8, 1853, and with the secretary of state January 25, 1853.

No certificate, stating the amount of the capital stock of the corporation, and that the same had been paid in, was filed in, the office of the clerk of the county of New York, nor was the capital paid in, in full; but the company commenced the business provided for in the articles of association, having its principal business office in the county of New York; and it contracted various debts and liabilities on which suits were afterward brought, judgments recovered and executions issued and returned *nulla bona*.

Suits were brought on these judgments (vide *Eaton v. Aspinwall*, 6 Duer., 176, aff'd. 19 N. Y., 119; *Abbott v. Aspinwall*, 26 Barb., 202) against the plaintiff, and judgments were recovered against him thereon, with costs; the plaintiff had paid these judgments, and also had incurred and paid expenses for legal services in defending the suits.

The referee made an allowance to the plaintiff for such costs as he deemed reasonable in each of the suits, and found that such of the defendants as were stockholders at the time the liabilities had been incurred, upon which the judgments against the company had been recovered, were liable in contribution; and that such of said stockholders as were solvent should further contribute to the payment proportion-

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ably, of the amounts uncollectible from those who were insolvent.

He also charged the defendant, Torrance, with liability to contribute for certain shares of stock standing in the name of the defendant, Ramsey, on the company's books, under facts which appear in the opinion of the court. Separate appeals were brought by defendants, Ramsey and Torrance, but both appeals are disposed of in this opinion.

John Sherwood, for the appellants, Morgan, Cutting, Edward M. and Henry Hopkins, and Bayles.

Charles A. Rapallo, for the appellant, Torrance,

William M. Evarts, for the respondent.

Present—INGRAHAM, BARNARD and BRADY, JJ.

By the Court—INGRAHAM, P. J. The principal question submitted in this case is, whether a stockholder, who has been compelled to pay a debt due a corporation formed under this general law, can maintain an action against all the stockholders at the time of contracting the debt, for contribution, when the stockholders are only severally liable under the statute.

In *Young v. N. Y. and Liverpool U. S. Mail Steamship Co.* (15 Abbott, 69), an action was brought against the stockholders, praying for an account, and that judgment might be given that each stockholder pay the amount he should be found liable to pay, &c.; and the court, in General Term, held that the defendants were not jointly liable in that action. It is said in regard to this case, that it was an action by a creditor, and that his remedy is against individual stockholders.

The cases relied on as sustaining the plaintiff's right to contribution, are *Slee v. Bloom* and *Briggs v. Penniman*, in our own courts.

In *Slee v. Bloom* (19 John., 456), the stockholders were individually liable, and the action for contribution was held to be maintained, and contribution was decreed. In that case the plaintiff was a creditor, and the chancellor had dismissed the bill, holding that the plaintiff had no right to maintain the action.

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The Court of Errors reversed the decree of the chancellor, holding the stockholders liable to the extent of their respective shares.

This decision was again affirmed. (20 J. R., 669.) In *Briggs v. Penniman* (8 Cowen, 387), the complainant was also a creditor. The stockholders were individually liable; and in that case, as in that of *Slee v. Bloom*, the court held them liable to pay the debt due the complainant. Neither of these cases were brought by a stockholder, against the other stockholders, to compel contribution.

In *Judson v. The Rossie Galena Co.* (9 Paige, 598), the chancellor says: "Those stockholders who are compelled to pay more than their rateable proportions of the debts, &c., will have a claim for contribution against other stockholders who are liable for the same debts." The liability in that case was joint and several.

In various other cases, this liability is said to be the same as that of partners. (*Allen v. Sewall*, 2 Wend, 327; *Moss v. Oakley*, 2 Hill, 269; *Bailey v. Bancker*, 3 Hill, 188.) In the latter case, BRONSON, J., says: "They should be left to such remedies as had been provided by law for the adjustment of partnership transactions. They may go into chancery for an account, and have the claims of all parties settled upon an equitable principle."

Several other cases were referred to on the argument, but all tending to the same points, and most of them to cases of joint liability, but none have been cited establishing the reverse of the proposition, viz.: That in cases of several liability, no contribution can be enforced.

The equitable doctrine of contribution rests upon the principle, that where all are equally liable for the payment of a debt, all are bound equally to contribute to that purpose. The cases above referred to all rest upon this principle, and although I entertain some doubt as to this rule when applied to persons severally liable, I am disposed to adopt the view of the referee, that, although the action for the claim must be against one alone, yet when that one has paid the whole debt,

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he may claim that others equally liable with him shall bear a share of his loss. This was so stated by DENIO, J., in *Garrison v. Howe* (17 N. Y., 458), where he says: "If a stockholder be sued to enforce his individual liability, he may himself resort to a suit for an account and for distribution."

My conclusion is, that the stockholders, who were such at the time of contracting this debt, are bound to contribute proportionally to the amount of their stock in payment of the plaintiff's claims.

In regard to the appeal of defendant Torrance, in this case, the referee has held Torrance liable to contribution on stock which belonged to Ramsey. In March, 1854, Torrance, as agent of Mr. Vanderbilt, loaned to Ramsey \$3,000 on 750 shares of stock of the Mexican Ocean Mail and Inland Company, and took a certificate with blank power attached; afterward Ramsey applied to Torrance to have Vanderbilt take the stock and release Ramsey from his indebtedness, and added that Vanderbilt was willing. Torrance supposing the matter understood between them, agreed to the proposition, and the certificate remained in his possession, but the stock was never transferred on the books, and Torrance gave up the stock note.

Ramsey throughout knew that Torrance was acting as agent for Vanderbilt.

There is nothing in this transaction that warrants Ramsey in charging Torrance as purchaser. If anybody was liable to Ramsey, it was Vanderbilt and not Torrance. Ramsey had seen Vanderbilt and conversed with him, and the subsequent action of Torrance in surrendering the note of Ramsey and accepting the stock for Vanderbilt as a purchase, was the result of Ramsey's statement to Torrance, that he had seen Vanderbilt and that Vanderbilt would take up the loan and buy the stock, and that he had directed Ramsey to call on Torrance to arrange it. On this Torrance acted, saying Vanderbilt had told him about it, but he says he was induced to agree to it by Ramsey's statement.

I see nothing in this, which in an action between Ramsey

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and Torrance, would make Torrance liable as the purchaser. There was no misrepresentation of any fact by Torrance. If there was any it was that of Ramsey, when he said Vanderbilt was willing to buy. There was no concealment by Torrance, and Ramsey knew all and more than Torrance as to the terms of the agreement with Vanderbilt.

There was no wrongful intention to act as agent. He was the agent, and he exceeded his powers only on the assumption of Ramsey, that he had conversed with Vanderbilt, and that he was willing to purchase.

I find nothing in the case of *White v. Madison* (26 N. Y., 117), that conflicts with these views. In that case, the agent had signed the note in the name of another without authority, and he was held liable on the presumed warrantee that he had such authority. There is a class of cases in which an agent is held excused from liability, where he had acted in good faith, and the facts were known to both parties. (Story on Agency, § 265, and cases there cited.) With how much more propriety may that rule be applied, when the agent is induced to act on his supposed agency, by the representation of the party with whom he is dealing.

It is very apparent from this case, that no deception or misrepresentation was intended or practiced. Both parties had conversed with Vanderbilt, and Ramsey had quite as much knowledge (as appears from his declaration), as Torrance had.

There is another reason why this rule cannot be applied to the present case. Vanderbilt held the stock as collateral to the loan of \$3,000. That loan still remains unpaid, and the title to the stock is still in Vanderbilt. His title could not be divested without his consent, and there could be therefore, no sale by Ramsey to Torrance, for payment to be made in the note held by Vanderbilt, even if both of them had so contracted. I cannot see how there can be a sale by operation of law, which the parties could not make directly. The note still remains due to Vanderbilt; he is entitled to hold the stock as pledged to him as security for that loan

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and until that debt be paid, the stock can be transferred to no other person by Ramsey. Torrance may be liable to Ramsey in damages, but with that we have nothing to do.

The referee found that Ramsey was discharged from liability to Vanderbilt, and ceased to have any interest in the stock after this transaction. In this finding, I think he erred for the reasons above stated.

The referee also finds, that Torrance is estopped from setting up this defence by reason of the judgment in favor of Rankin against Torrance, in which it was adjudged that Torrance was the owner of the said stock; and he also finds that Torrance has appealed from the said judgment, and that such appeal is undetermined.

That judgment was not between the same parties, and was not a final judgment. While the appeal was pending, it did not estop the defendant from denying his liability in the present action.

Whether, under the facts proven in this case, the defendant Torrance can be considered as the principal, and, therefore, the owner of the stock, may well be doubted. According to several decisions in the earlier cases, a party who, acting as agent, exceeded his authority, would be held liable as the principal. (*White v. Skinner*, 13 John., 307; *Feeter v. Heath*, 11 Wend., 477; *Palmer v. Stephens*, 1 Denio, 480; *Plumb v. Milk*, 19 Barb., 74.)

In most of the cases the contract was in writing, and signed by the party sought to be charged, as agent for another; but in all of them the true rule upon which the party is held to be liable is the warrantee as to his agency.

In later cases, this liability of the agent, as principal, has been denied. In *Walker v. The Bank of the State of New York* (5 Seld., 582), it was said that the rule was necessarily limited to written contracts, where the agent had subscribed his own name, as well as his principal's; and the liability of the agent was made out by striking out the signature which was made without authority.

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In *White v. Madison* (26 N. Y. Rep., 117), SELDEN, J., says he should hesitate to affirm the principle that one who enters into a contract in the name of another, without authority, is to be himself holden as a party to the contract; and he adds, that the appropriate remedy is an action for the deceit, or on the warrantee of agency.

In a later case of *Hegeman v. Johnson* (35 Barb., 200), the cases were again reviewed by EMOTT, J., and he adopted a new distinction between cases that were founded on an executed contract, and those that were merely executory, in which cases the agent could not be made liable on the contract personally.

In no case that I have been referred to has the agent been held liable as the principal, where the extent of agency was as well known to the one party as the other, or when the agent was induced to enter into the contract on the suggestion of his agency by the party with whom he contracted.

The judgment against Torrance should be reversed. All concurring.

Ordered accordingly.

The AMERICAN BANK NOTE COMPANY v. TRACY R. EDSON.

(GENERAL TERM, FIRST DISTRICT, JANUARY, 1870.)

Defendant being a member of a partnership firm, purchased from one of its employees the patent right in an article of use and value in the firm business, and without disclosing or being asked to disclose the terms upon which he had purchased, offered to sell it at an advance to the firm; the firm had the offer under consideration for some months, using the patented article meanwhile, and finally declined to buy, preferring to pay defendant a royalty for use of the article, which it did.—*Held*, the rights, if any, which the firm originally had to claim the defendant's purchase as for its benefit, could not be insisted on after its dissolution. BRADY, J., dissenting.

Held, further, that said patent right did not pass under a transfer of the property of the firm. *Id*.

And the said firm having with other firms, and one G., all engaged in the same business, entered into articles of association, reciting that the parties thereto, as firms and individuals theretofore and

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then, engaged in the business of, &c., were desirous to unite their establishments, and also reciting, as follows: "We agree, that upon signing these articles, all the machinery, presses, tools, instruments, plates and dies, stock of materials, furniture and effects belonging to our establishments in the business, * * * or the business collateral thereto, shall be and by virtue of these articles are transferred to the trustees, &c,"—*Held*, the agreement included all the property of the establishments, whether conducted by firms or individuals, but did not embrace individual property of members of firms, nor any property not used in the establishments as they existed previous to the association. *Id.*

And that this was so, although the articles were signed by the individual members of the firms. *Id.*

In 1858, and for a number of years previously, the firm of Rawdon, Wright, Hatch & Edson, had existed as the leading house in the bank note engraving business, and the defendant was a member of that firm.

One Matthews, who was in the employ of the firm, discovered a new process or ink for printing bank notes. This ink was subsequently known by the designation of the "green tint."

On 29th April, 1857, Matthews sold to the defendant the absolute right and property in this discovery, with authority to take out letters patent, in the name of Matthews, for the benefit of Edson.

On 30th June, Edson procured the patent in the name of Matthews, but held it for his own use under the assignment.

Edson agreed to pay Matthews, for the transfer of this patent, &c., \$500 in cash, and two dollars for every 1,000 impressions on which the ink should be used, until Matthews received \$3,500; and all expenses of taking out the patent and testing the ink were to be at Edson's cost.

Immediately after Edson obtained the right to this discovery he offered it to the firm, of which he was a member, for \$3,000 as he testifies, and the payment of a royalty of five dollars for every 1,000 impressions that might be printed by them; they to pay the expense of patenting and testing the discovery. One of the other members of the firm states that it was offered at a higher price and the same royalty, and that the firm declined the offer. The referee found the offer to

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have been as stated by Edson. It is stated by Edson that the firm held the matter under advisement some three months, while they were testing the discovery.

From May until fall of 1857, the matter was under consideration, when the firm decided not to buy, and concluded that they would prefer to take their chance with others in the use of it, and pay for the right to use it. From that time until the formation of the plaintiff's corporation, on 29th April, 1858, the firm of Rawdon, Wright, Hatch & Edson used this ink, and charged their customers five dollars per thousand impressions, which was placed by the firm to the credit of Edson.

On the 29th April, 1858, a new firm was formed and was composed of the individual members of six firms engaged in that business and Mr. Gavit. It was agreed in the articles of association that, upon signing the articles, all the machinery, presses, tools, instruments and implements, plates and dies, stock of materials, furniture and effects *belonging to their establishments*, in the business of bank note engraving and printing, or the business collateral thereto, and all orders and contracts, should be transferred and assigned to the new company.

After the organization of the new company, "the green" tint was used in their work, and the charge of five dollars was made to customers therefor, and this amount was paid over to Edson, the same as under the old firm, though the referee found there was no express arrangement in reference to its use.

In October, 1860, a committee of the new company, which had been appointed some time previously, on an opinion by Danl. Lord, Esq., reported that Edson had a right to receive the compensation for the use of the green tint, and the board appointed a committee to negotiate with him for the sale of his entire interest. Edson refused to sell, and the company continued the payments to him until 1863, amounting to large sums of money.

On these facts the referee found that the right to use the green tint passed to the plaintiffs under the articles of association; that the money received by the defendant was with-

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out right, and the plaintiffs were entitled to have the same repaid, with interest.

From this judgment the defendant appealed to this court.

Wm. F. Allen and Jno. E. Parsons, for the appellant.

Joseph H. Choate, for the respondent.

Present—INGRAHAM, BARNARD and BRADY, JJ.

By the Court—INGRAHAM, P. J. It is not claimed, on the part of the plaintiffs, that the discovery made by Matthews was, while owned by him, subject to any claim of the firm in whose employ he was, or that he had not a perfect right to use or sell the patent for it while under his control. His relations to the firm of Rawdon, Wright, Hatch & Edson were at no time such as to impose on him any duty or obligation to give the benefit of his discovery to that firm. Whatever reservation there may have been made, in the articles of association, of authority to the firm of Rawdon, Wright, Hatch & Edson to convey shares to Matthews for his interest in the firm, it was after the transfer of this patent to Edson, and there was no proof of any such subsisting interest ever existing, either before or after such transfer.

The case, then, presents two questions for our decision, one whether the firm of Rawdon, Wright, Hatch & Edson, by their relations with Edson, could claim the purchase by Edson to be for their benefit; and the other, whether the right to the use of the discovery under the patent passed to the plaintiffs, by virtue of the articles of association.

The terms of the partnership of the first firm were not in evidence, and if there is anything which prevented Edson from obtaining this patent for his own use, it must be found in the general rules applicable to partners, viz.: That one partner cannot deal on his own account in any matter at variance with the business of the partnership, or that would deprive the firm of any portion of his skill, industry or capital, which he is bound to employ in the business of the

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firm, or to prefer his own interest to that of the firm, or purchase articles needed for the firm on his own account, or generally make bargains for himself by which the firm sustains a loss, or take to himself benefits, the profits of which legitimately belong to the firm.

The true meaning of all such provisions is to require the members of the firm to devote their time, labor and skill to the benefit of the firm, and not to themselves individually, and to forbid their purchasing, for their own use, articles in which the firm necessarily deal, at the risk of having the same claimed by the firm as belonging to them, with a right to the profits arising therefrom.

I do not understand these rules as prohibiting such dealings, nor as making void any such contracts which violate these rules, but only as subjecting the member of the firm who makes them to a liability to the firm to render to them an account of the profits.

No such claim was ever made by the firm during its existence. They had notice of the discovery and the patent, they had notice that Edson was interested in it, they had the offer from Edson to sell it to them, they had that offer under consideration for months while they were using the patented article, and they finally refused to purchase, expressing their choice to be to use and pay for the same, rather than to be the purchaser, and they did continue to pay for the same down to the time when the firm ceased to exist by merger in the corporation.

Whatever may have been their rights, originally, I think there can be doubt that their rights were waived, and that their refusal to accept the purchase when offered, and their neglect to claim any rights which they might have possessed, originally, prevented any enforcement of such a claim after the dissolution of the firm. I do not mean to concede that the purchase of a patent right, such as this was, would be a violation of duty on the part of Edson; but I deem it unnecessary to discuss that question, because it seems to me, that even

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if it were so, the acts of the firm were such as to put an end to any claim which they might otherwise have made.

It is suggested in the respondent's points, that Edson did not communicate to the firm the terms on which he had become the purchaser, and therefore, they were not bound by his offer and their refusal.

It must be observed, that no representation was made as to its cost, nor was any such inquiry made of Edson. He was negotiating the sale, as of property belonging to himself, and there is no finding by the referee that Edson was guilty of any intentional fraud; on the contrary, the referee, in his opinion, exonerates him from any such imputation, for anything done in regard to this offer to his firm. It is obvious, that at this time, the firm did not consider the invention of sufficient value to warrant the payment of the price suggested. The demand for such printing being at that time comparatively small, the firm preferred paying a royalty for its use, rather than to become the purchaser.

The omission to insert this patent in the inventory of the property and effects of the firm, or in the schedule of the property transferred, is further evidence that at the time when the existence of the firm was to terminate, they did not consider themselves in any way the owners of this patent.

The second inquiry is, whether it passed to the plaintiffs under the articles of association signed by the members of the different firms in their individual capacities. From what has already been stated, it is apparent that it could not pass as the property of Rawdon, Wright, Hatch & Edson, because it did not at any time belong to them during the existence of their firm; but, on the contrary, they had expressly refused to become such owners. Did it pass as the individual property of Edson? It can hardly be urged that these articles were intended to transfer to the association all the private property of the individual, although such property might have been tools, instruments, furniture, &c., applicable to the business of bank note engraving and printing, which they might have owned, if the same had not been used in the establishment of

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one or more of the contracting parties. Such property should still remain the property of the individual owning it at the time of executing the articles.

The articles of association recite that the parties to it as firms and individuals theretofore and then engaged in the business, &c., were desirous of uniting their establishments. The evident meaning of this recital is, that such as had firms were to unite, and those who were individually carrying on the business were also to unite in the consolidation.

The portion of the agreement which specially defined what was to be transferred is contained in the second article, viz.: "We agree that upon signing these articles, all the machinery, presses, tools, instruments, plates and dies, stock of materials, furniture and effects *belonging to our establishments* in the business of bank note engraving and printing, or the business collateral thereto, shall be, and by virtue of these articles are transferred to the trustees, &c."

These words include all the property of the establishments for the business of bank note engraving and printing. Whether these establishments were conducted by firms or by individuals, all such articles which belonged thereto were to go into the common property of the association. It did not embrace individual property of members of firms, nor any property not used in the establishments as they existed previous to the association.

The separate execution by the individuals is controlled by the provisions of the second article which specifically declares the property to be transferred, and confines it to that which appertained to their respective establishments. It did not include a patent right belonging to an individual member of one of the firms which had never belonged to such firms, but had always been acknowledged to be the individual property of some other person. If there could be any doubt as to what was to be transferred under the second section of the articles of association, that would be removed by the provisions of the third section which provides for the distribution of the shares of stock to the respective firms and to Mr. Gavit, who

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was not a member of any firm, and which states that such shares were so issued and delivered to each firm or individual, and should represent the estimate and agreed value of the property, &c., sold and transferred to the said company.

The examinations of the firms show that the property transferred was the property of such firms, and the omission of any individual member of such firm shows that it was not contemplated that the individual property of any member was to be included. Likewise the omission of any compensation to any such individual member shows that no property of such person had been taken into the estimate of valuation for which stock was to be issued.

The like inference must follow from the inventory of the property of Rawdon, Wright, Hatch & Edson, as taken for this purpose. It excludes the idea that the "green tint" entered into such valuation, or was considered at that time as forming any part of the assets of that company.

In whatever view this question is examined, it seems to me clear that, at the time of entering into these articles, neither the old firm, of which Edson was a member, nor any of the parties uniting to form the new association, considered this patent as their property, or as transferred to the association; that nothing was allowed for it in the appraisement, and, although it had cost a considerable sum, no provision was made for its transfer, and no allowance made to any one as having transferred it to the association. The probability is, that at the time of forming these articles its value was uncertain; that the price was more than they were willing to pay for it, and that, as appears from their subsequent conduct, the associates deemed it wiser to collect the royalty and pay it over rather than to assume the ownership by purchase and the expenditure of the money demanded.

The subsequent course of the plaintiff, in continuing its use and paying the royalty for it from 1858 to 1863 without objection, and the attempt to negotiate in 1860 for the purchase from Edson, shows clearly the understanding of the

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trustees as to their rights, and that up to 1860 none of them doubted the right of Edson to the patent as his property.

It may be that the agreement with Rawdon, Wright, Hatch & Edson, by which they had the use of this "green tint" on payment of the royalty, may be a continuing agreement; and, if so, that it might be considered as transferred to the plaintiffs, although the omission to include it in the inventory taken at the time would throw doubt on that supposition. That, however, is not necessary to be examined at this time, and is only referred to as explaining the letter of Edson to the secretary of the treasury in regard to the use of the "green tint" by the plaintiffs.

The views above expressed render it unnecessary to examine the other points raised on this appeal as to the effect of these payments being voluntarily made for so long a period of time, and during a portion of time when he was not trustee or acting in that relation to the stockholders.

The judgment should be reversed and a new trial ordered, costs to abide event.

BARNARD, J., concurred.

BRADY, J., gave an opinion for reversal, as follows:

My conclusions in this case, are:

1. That the purchase of the patent from Matthews by the defendant, was, in form, the individual acquisition of an important element in the business of the firm, namely, ink.

2. That the purchase, involved the use of capital, and its development and success, time and diligence, and if successful, which it was, would give him an advantage over his copartners, by subjecting them to the payment of a royalty for its use, if desirable in their business.

3. That such purchase was therefore, a violation of his duty to his copartners, and an act of infidelity to his associates, which could not inure to his individual benefit, to their exclusion.

4. That such acts and results, are prohibited and guarded against, by doctrines which are well established and clearly expressed in the elementary books. (3 Kent's Com., p. 52;

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Story on Part., §§ 177, 178 ; Parsons on Part., p. 225. See also, Smith's Mercantile Law, p. 37, and cases cited by referee), and are particularly applicable in this case, because the purchase was made from a person in the employment of the firm.

5. That the purchase having been thus made, the title to the patent vested not in Edson alone, but equitably in himself and his partners, subject only to their burden of the consideration paid, and of the expenditure made by him in relation to it.

6. That the offer by him to sell it to his associates does not change these results, inasmuch as he did not disclose to them, at the time of such offer, his entire interest in it, or the absolute nature of the purchase made by him, and did not then or at any time offer to make the transfer of it, or any interest in it upon the terms upon which he had bought it, but at a profit and with a condition of great advantage to himself.

7. That there is nothing in the case which justifies the legal conclusion that his partners waived their rights in the purchase growing out of their relations to him.

8. That the patent, therefore, belonging to the firm, passed to the plaintiffs, under the articles of association, but that the payments of royalty cannot be recovered back by them, whatever may be the equities between the defendant and his partners, inasmuch as they were made with full knowledge of the facts, and,

9. That for these reasons the judgment should be reversed.
Judgment reversed.

COLLINS KELLOGG, Respondent, v. DANIEL SWEENEY, Appellant.

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

A hotel guest, who having property in his possession as a gratuitous bailee, delivers it into the custody of the hotel-keeper, may have an action in

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his own right against such keeper, to recover for the loss thereof; and this is so, although the bailee may not be responsible for such loss to the actual owner.

And in such action the bailee may enforce, to its full extent, the liability resulting from the personal relation of innkeeper and guest.

A hotel-keeper who has received from his guest a satchel, such as is ordinarily used to contain clothing, and with no other information as to its contents, than that it contains property of value, cannot avoid liability for a loss of coin contained in the satchel, on the ground that the guest was negligent in placing it there.

So held, where the guest was not charged with notice, to place valuables in a safe provided, according to Laws 1855, chap. 421.

An innkeeper's liability is not limited to property of any particular kind or value; it embraces all the personal property of the guest brought to the inn.

And it seems, there is no rule exempting an inn-keeper from liability for money or jewelry, which have been left in the guest's room in his trunk, unless he brings home to the guest, notice that they must be delivered to him, or deposited in such place as he shall direct. Per MULLIN, J.

The liability being established,—*Held*, plaintiff was entitled to recover the market value of the coin in currency.

THE facts are stated in the opinion of the court.

Francis Byrne, for the appellant, cited upon the question of negligence by the plaintiff, *Bendetson v. French* (44 Barb., 31); *Fowler v. Dorlon*, et. al. (24 Barb., 384). He also cited *Hyatt v. Taylor* (51 Barb., 632); *Bendetson v. French*, upon the question of notice that defendant kept a safe as provided by chap. 90, Laws, 1855. Also Redfield on Carriers, 271. Also, as to defendant's liability for the coin in question, Redfield on Carriers, § 77, &c., and cases cited, *Wilkins v. Earle* (3 Robertson, 352); *Merrill v. Grinnell*, et al. (30 N. Y., 594 and 610); 1 Chitty Pleadings (6 Amer. Ed., p. 6 to 10.)

John D. Kernan, for the respondent, cited upon the right of the plaintiff to maintain the action, *Faulkner v. Brown* (13 Wend., 63); *Harrison v. Marshall* (4 E. D. Smith, 271); *Paddock v. Wing* (16 How., 547); *Gorum v. Carey* (1 Abb., 285); *Green v. Clarke* (2 Kern. 343); *Van Winkle v. U. S.*

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M. S. Co. (37 Barb., 122.) Story on Bailments (§§ 93, 94.) Upon the question of defendant's liability, he cited *Grinnell v. Cook* (3 Hill., 485, 488); *Hulett v. Swift* (33 N. Y., 571), Story on Bailments, §§ 470, 478; 2 Kent, Com., pp. 84, 85, 86, 87; *Piper v. Manny* (21 Wend., 282); *Wilkins v. Earle* (19 Abb., dissenting opinion, 200); *Kent v. Shucka* (2 Barn. and Adol., 803); *Needles v. Howard* (1 E. D. Smith, R. 54); *Taylor v. Monnot* (4 Duer, 116); *Stanton v. Leland* (4 E. D. Smith, 88, 93); *Fowler v. Dorlon* (24 Barb., 389); *McDonald v. Edgerton* (5 Barb., 560); *Van Wyck v. Howard* (12 How., 147); *Purvis v. Coleman* (21 N. Y., 112, 116); *Gile v. Libbey* (36 Barb., 70.)

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—MULLIN, J. The facts found by the referee, are:

1st. That in December, 1863, the defendant was an inn-keeper in the city of New York.

2d. On the night of the 9th of that month the plaintiff went to said hotel or inn and became a guest thereof.

3d. He, plaintiff, had in his custody a quantity of American gold coin, the property of Hudson Stevens, and which the plaintiff had received at Lowville, in the county of Lewis, to be carried gratuitously to the city of New York, and there delivered to said Stevens.

4th. The gold was in a small satchel, which, by the advice of a clerk in the said hotel, plaintiff delivered to the clerk in the office for safe keeping, and received a check therefor. When he delivered the satchel to the clerk he informed the latter that it contained property of value, but did not state the kind of property or its value.

5th. During the night the satchel was stolen from the office by some one in defendant's employ, the gold taken therefrom and the satchel thrown out of the hotel and upon the roof of an adjoining building. The plaintiff demanded the money of the defendant, who refused to re-deliver the same or pay therefor.

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6th. The defendant's clerk assigned to the plaintiff a bed in the parlor of the hotel, where he slept all night, and in such room no notice was posted pursuant to chap. 421 of the Laws of 1855.

7th. There was in the office of the hotel a safe, but defendant was not aware of it, nor had he any notice or knowledge that guests were required to place money or other valuables in such safe.

The referee, to whom it was referred to hear and determine the issues in said cause, ordered judgment for the plaintiff for the value of the gold coin, in legal tender currency, with interest; and from the judgment so entered defendant appeals.

The appellant's counsel insists that the finding of the referee, that the gold was in the plaintiff's satchel when it was delivered to the defendant's clerk is erroneous, the proof not being sufficient to establish that fact.

The finding is correct. It is hardly possible the plaintiff's evidence can be true and the gold not in the satchel on his arrival at the defendant's hotel. He put his hand into the satchel only a few minutes before he arrived in the city, and found there a parcel corresponding with the one containing the gold which he put into it at Lowville. It is possible he may have been mistaken, and that it was taken out at Utica or elsewhere on the journey.

But it is not enough that it was possible that the money was not in the satchel. The question is was it satisfactorily proved that it was in the satchel. I cannot doubt but it was. The subsequent dealing with the satchel is some evidence that the gold was in it when it was stolen.

The appellant's counsel also insists that the plaintiff was guilty of negligence in carrying the gold in such a satchel, it being one usually used for clothing, etc.

I am not aware of any rule of law requiring a traveler to carry his property in any particular kind of bag or box. If it has sufficient strength to prevent the escape of the contents and is properly secured, it is enough.

If an innkeeper is not satisfied with the manner in which a

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package containing valuables is done up or secured, he should require the guest to make it secure. If he accepts it in deposit without objection, he should not be allowed to object to it after a loss has occurred.

The defendant's clerk was informed that the satchel contained valuables, and he could not thereafter pretend that he believed it to contain clothing only. He was put upon his guard, and there is reason to apprehend that this announcement as to the value of the contents of the satchel was overheard by some one of the servants and led to the losing.

Amongst the grounds relied on by the appellant's counsel to defeat a recovery before the referee was, that the plaintiff was not the owner of the gold coin, and could not, therefore, maintain an action for it.

The plaintiff had it in his possession as a gratuitous bailee, and had therefore a legal interest in it, which enabled him to maintain an action for any injury to it or unlawful conversion of it while thus in his possession.

The transaction between the plaintiff and Stevens was a mandate, and the plaintiff assumed the liabilities, and was clothed with the rights of a mandatory.

It is said in Story on Bailments (§ 152), that when a mandatory delivers goods to another person, and they receive an injury for which the mandatory would be liable over to the owner, there does not seem to be any objection upon principle, to his right to recover for his own indemnity.

The general principle of the common law is, that possession with an assertion of right, and in many cases possession alone, is a sufficient title to enable the possessor to maintain a suit against a mere wrong doer, for any wrong or injury done to the thing.

Again, at § 171 (d), it is said if a mandatory should gratuitously undertake to carry, or pay, or to transmit money for a mandator, to a particular place, there to be paid on a particular day, and the money should be delivered to him for that purpose, he would be bound by his receipt of the money to carry, pay, or transmit it accordingly; and if he should omit

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so to do, he would be responsible to the mandator for his negligence.

In the case put by the learned writer, the mandatory is held to be liable upon his contract. But he does not mean that because there is in law, a contract in case of mandate to carry gratuitously, that the mandatory's liability is thereby enlarged. He is only liable for gross negligence, and when sued on his contract, he may defend himself by proving absence of negligence.

In the case before us, there can be no doubt but that the plaintiff could successfully defend an action by Stevens to recover on the contract to carry and deliver.

He must ride in public conveyances, and assume the risks incident thereto; he must stop at inns, and trust himself and the property in his possession, to the danger of loss by theft, or robbery, or fire.

The owner knew of the risks which his property incurred, and he delivered it to the plaintiff subject to them.

The delivery by the plaintiff to defendant was a delivery lawfully made, and bound the owner of the gold. In other words, the transfer of the possession to the defendant, relieved the plaintiff from further liability to the owners, and under ordinary circumstances, would give the owner a right of action for its conversion against the depository. But because the owner could sue, it does not follow that the plaintiff might not also sue.

If plaintiff had entered into a special contract with defendant, as to the care and custody of the gold, he alone could sue upon it.

The plaintiff being a guest in the defendant's inn, his property passed into the defendant's custody, subject to the rights and liabilities resulting from such a relation. And no person but the guest, can enforce the liability of the defendant as innkeeper, having obtained the custody of the goods from his guest.

Stevens was not defendant's guest, and could not enforce any liability incurred by the defendant to plaintiff as such.

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If then there is any remedy against defendant for the loss of the goods, resulting from the relation of innkeeper and guest, it exists only in favor of the plaintiff.

It may be that Stevens could sue for a conversion of, or injury to the goods, but such right of action would rest on his general property in the gold, and not upon any right resulting from the relation of innkeeper and guest.

The important question in the case is, whether the defendant is liable to plaintiff as innkeeper for the value of the gold.

It is recited in the *Registrum Brevium*, that by the custom of the realm, innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage in any manner shall thereby come to their guests, from the negligence of the innkeeper or his servants.

Story, in his work on *Bailments* (§ 470), says: If the goods, or baggage of the guest are damaged in the inn, or are stolen from it by the servants or domestics, or another stranger guest, the innkeeper is bound to make restitution.

Again, at § 471, the same author says: It is not necessary to prove that the goods have been lost by the negligence of the innkeeper; for it is his duty to provide honest servants, and keep honest inmates, and exercise and exact vigilance over all persons coming into his house as guests, or otherwise; nor is it necessary, that the goods should be in his special keeping, but it is generally sufficient that they are in the inn, under his implied care.

At § 479 it is said a delivery of the goods into the custody of the innkeeper is not necessary to charge him with them; for although the guest doth not deliver them or acquaint the innkeeper with them, still the latter is bound to pay for them if they are stolen or carried away.

That the plaintiff's case is brought within the principles above asserted cannot be doubted; such liability is not limited to property of any particular kind or value, it embraces all the personal property of the guest brought to the inn.

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It has been held that a common carrier of passengers, is liable only for money contained in a trunk or other depository of a passenger's baggage, which has been lost, to an amount reasonably sufficient to defray the expenses of the journey on which the passenger at the time of the loss has entered.

This rule has never been extended to innkeepers that I have been able to discover. Yet it would be difficult to furnish a reason why it should not apply to both. Custom-created the liability of both, and the same considerations that induced a limitation of the liability of the one, should limit it as to the other.

It is enough, however, that no such limit has been applied to the liability of innkeepers.

It would seem to be just and reasonable, that when a satchel, bag, or trunk of a guest contains articles of great value, that he should disclose it to the innkeeper, to the end that he may adopt such precautions against loss, as the magnitude of the value makes necessary.

It is very hard upon a landlord to hold him liable for large sums of money or jewelry which has been left in a guest's room in his trunk, when no intimation has been given that any such property has been taken there.

But hard as it is, I find no case which exempts him unless he brings home to the guest notice that such valuables must be delivered to him (the landlord) or deposited in such place as he shall direct.

The plaintiff was entitled to recover the market value in legal tender currency of the gold converted.

Although the acts making gold coin a legal tender are not repealed, yet the effect of making paper a legal tender in payment of debts has been to convert gold coin into an article of merchandise, and it becomes necessary thus to treat it, or the greatest injustice must result.

No wrong-doer should be permitted to be the gainer by his wrong. But if I seize my neighbor's gold coin, worth in the market eighty per cent premium, and discharge my liability by paying in legal tender notes, I have made a splendid

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speculation. If such is declared to be the law, holders of gold and silver coin will need an army to protect them. Such cannot be the law.

The defendant did not do what was necessary to obtain the protection of the act of 1855, and he has no reason to complain that he has lost the benefit of it.

The judgment should be affirmed.

BACON and FOSTER, JJ., concurred. MORGAN, J., dissented.
Judgment affirmed.

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CHARLES T. WOOD and FREDERICK F. WOOD, by EMMA WOOD, his guardian, v. SOMERS MOORHOUSE, AMASA P. HART, LEVI CARRIER, JAMES F. SIMONS, AMOS HUNTLY, CYRUS JEWETT and others, Respondents.

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

An execution was issued to the sheriff in September, 1838; on the 26th of the same month, he caused notice of the sale of certain real estate, belonging to the judgment debtor, for the 1st November ensuing, to be inserted in a newspaper, printed in the proper county, and continued once a week, for six successive weeks, and sold said property under the execution, at an adjourned day of sale. The judgment debtor died in October, 1838.—*Held*, a valid sale, as against the heirs-at-law of the judgment debtor, notwithstanding the latter's death pending the advertisement.

Notices of the sale were posted by the sheriff for a shorter time than directed by the statute; the plaintiff in the execution purchased at the sale, without knowledge of the irregularity, for less than his judgment, and assigned the certificate, for a valuable consideration; and the same was several times further assigned to assignees for value and without notice; and within fifteen months after the sale, the last assignee, who was also owner by assignment of a judgment lien on the property, redeemed the premises, and obtained a sheriff's deed therefor. In 1843, a mortgage, executed in 1835, upon the property, was foreclosed, the property sold, and the purchaser entered at once into possession, and continued to occupy through those claiming under him at the time of this suit. The heirs-at-law of the judgment debtor, the eldest of whom, at the time of his death (October 1838), was seven years of age, not being made

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parties to the foreclosure, brought this suit, in 1862, to redeem the property from the said mortgage.—*Held*, the plaintiff's title in the property has been divested by the execution sale, redemption, and deed thereon, and the complaint was properly dismissed.

It seems, the purchaser at the execution sale, though plaintiff in the execution, was not chargeable with notice of the irregularities in the sheriff's proceedings under the execution.

And it seems, although the court may, on motion, set aside the sale for such irregularities, and order another, yet, when the party injured delays until the sale has been consummated, or until the time for making a motion has gone by, the purchaser, although plaintiff in the judgment, must be considered a *bona fide* purchaser, under § 40, 2 R. S., 369.

And if not a *bona fide* purchaser, it seems, if he has assigned the certificate, or a redeeming creditor has acquired his interest for value paid, the judgment debtor cannot assail the title of such purchaser, or creditor, by reason of defects or irregularities in the proceedings to sell.

It seems that every person buying at a sheriff's sale, for the purpose of satisfying an honest debt, is a *bona fide* purchaser.

It seems that the statute relating to the time and manner of giving notice is directory merely, and non-compliance with its provisions does not vitiate the sale; and if mandatory, the remedy is by motion.

That where a sale is made in violation of law, *e. g.*, at a time before sunrise, &c., the purchaser will be presumed to know the law, and though he acts in good faith, that it is not in accordance therewith; otherwise, however, where the sheriff's proceedings have been irregular. In the latter case, the purchaser is at liberty to presume that the officer has discharged his official duty.

It seems where a sale is irregular, for the reasons mentioned, an application to set it aside after the debt is discharged by the statute of limitations, and the plaintiffs are chargeable with gross *laches*, comes too late.

Held, further, that it would be presumed in favor of the proceedings on the redemption in question, that the money was paid by the redeeming creditor to the purchaser, creditor, or officer making the sale, as required by §§ 59 and 60, 2 R. S., 373.

Also, that such creditor had produced a certified copy of the judgment on which he redeemed, together with a verified copy of the assignment, or an affidavit of the amount due (§ 60).

Also, that such creditor had caused the execution of all assignments of the certificates to be acknowledged, or proved as deeds, as required (Id. 297, § 69), and to be filed in the office of the county clerk.

On the 5th October, 1835, the premises in question in this suit were owned by Daniel Kellogg. On that day he conveyed them to Richard S. Corning, taking from the latter a

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mortgage on said premises to secure \$7,656.08 of the purchase money, payable in six equal annual installments, with interest.

On the 2d December, 1837, Corning conveyed said premises to Theodore and Junius Wood, subject to said mortgage.

In May, 1836, said Kellogg died, leaving a will, in which Leitch, Kellogg and Comstock were appointed executors.

The will was duly proved, and the executors took upon themselves the duties of said trust.

In December, 1841, said executors commenced an action in chancery to foreclose said mortgage, and such proceedings were had in said action that judgment of foreclosure was entered, and by virtue thereof, said premises were sold by one of the masters of said court, on the 22d April, 1843. Leitch, one of the executors, became the purchaser at said sale, and received the master's deed of the premises.

Corning, Sophronia Wood, executrix of Theodore Wood, Junius Wood, Harry Raynor, and Willet Raynor, were the only defendants in the action.

Theodore Wood, one of the tenants in common of the premises, died in October, 1838, owning one-half thereof, and leaving him surviving his widow, Sophronia and Charles T. and Frederick L. Wood, his children and only heirs-at-law. Said Wood left a last will, whereby he devised all his real estate to his two sons, subject to the dower of his widow therein.

By the will, the executors were authorized to sell so much of his real estate as should be necessary to pay his debts after applying the personal estate; and the residue of his estate, after the debts were paid, was to be divided among his heirs according to the laws of the State.

At the time of the death of said Theodore Wood, the said Charles T. and Frederick L. were minors, the former being seven and the latter six years of age.

Leitch, immediately after his purchase of said premises, went into possession under the title acquired by his purchase

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at the master's sale, and he and those claiming under him viz.: the defendants Moorhouse, Hart, Carrier, Simons, Huntly and Jewett, have ever since been in possession, and received the rents and profits thereof.

On the 1st January, 1838, a judgment was recovered in the Supreme Court by Timothy Pratt, against Baker, Brackett and Theodore Wood, for \$2,000.

In September of the same year an execution issued on the same judgment to the sheriff of the county of Oswego, who, on the 26th of that month, caused a notice, dated on that day, to be published in a newspaper printed in said county once in each week, for six successive weeks, that said premises would be sold to satisfy said execution on the 1st November then next, at ten A. M., at Fulton.

Notices of said sale were not posted in three public places in said town six weeks before the day of sale, but they were posted for more than five weeks before such day of sale.

On the 10th November said premises were sold by the sheriff, and bid in by said Pratt for \$600, and the sheriff executed and delivered to him a certificate of said sale; a copy thereof was filed in the clerk's office of Oswego county, and the sheriff's fees, poundage, &c., paid by said Pratt.

The said certificate came through several assignments made for a valuable consideration from Pratt to Henry Davis, Jr., and without notice to any of the assignees that the notices of the sale had not been duly posted.

On the 7th May, 1838, Horace White recovered a judgment in the Supreme Court against Theodore Wood for \$263.93, which judgment said White assigned to said Davis.

Before the expiration of fifteen months from the sale on the Pratt judgment, and while one Johnson held the certificate of the sheriff of said sale, said Davis redeemed the said premises from said sale, paying Johnson the amount necessary to be paid for that purpose, and obtained a deed from the sheriff.

On the 4th February, 1863, the said Frederick L. Wood died intestate, leaving Charles F. Wood, his only heir-at-law,

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him surviving, who was substituted as plaintiff in the action for said Frederick, the original plaintiff.

Sophronia Wood, the widow of said Theodore, died before this suit was commenced.

The judge before whom this cause was tried, held the foreclosure invalid as to the plaintiffs, but that their title was divested by the sale on the execution, redemption, and deed to Davis, and dismissed the complaint with costs, as to all the defendants but Monroe; as to him, without costs.

The object of the action, which was commenced May 9, 1862, was to redeem from the mortgage from Corning to Kellogg, above described.

W. and A. B. Porter, for the appellants.

D. Pratt, for the respondent.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—MULLIN, J. The heirs of Theodore Wood were indispensable parties to the action to foreclose the mortgage given by Corning to Kellogg; and not having been made such, the foreclosure as to them was of no force or effect whatever. (Story's Eq. Pl., 196.)

The plaintiff's right to redeem, therefore, is perfect if their title was not cut off by the sale under the Pratt judgment, the redemption by Davis, and conveyance by the sheriff.

The grounds relied on to invalidate the sale, and subsequent proceedings of the sheriff, and the proceedings to redeem, are:

1st. That the sale on the execution was after the death of Theodore Wood, and such sale, though on process issued before his death, does not divest the title of his heirs. They must have notice of any proceeding that is to produce such a result.

2d. The sale to Pratt was void, because the notices were not posted for six weeks prior to the sale.

3d. The proceedings by Davis to redeem were inoperative, and hence no redemption was effected.

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4th. The deed to Davis is void, because the execution of the assignment of the certificate to him was not proved, or acknowledged, nor was a copy filed in the clerk's office.

If the plaintiff's counsel is right in these propositions, the judgment is wrong, and should be reversed.

I will examine these propositions of the counsel in the order in which they are stated above.

1st. Did the sale on the execution, after the death of Theodore Wood, if regularly conducted on the process issued in his lifetime, divest the title of his heirs in the lands sold?

At common law, the death of a defendant, after judgment and execution, did not operate to stay proceedings on the writ as against either personal or real property. (Graham's Practice, 2d ed., 350; Tidd's Pr. 915.)

There is nothing in the provisions of the Revised Statutes, in force when this execution on which the sale was made was issued, changing the common law rule as to the effect of death after judgment and execution issued. See the views of SAVAGE, C. J., in *Nichols v. Chapman* (9 Wend., 452).

If the execution could not be executed, it must have been because of the death, and a *scire facias* was necessary to either revive the judgment, or to obtain execution upon one already entered.

If a *scire facias* was necessary, the heirs or terre tenants of judgment debtors, when land was desired to be sold, were necessary parties. But neither by the common law, nor by the Revised Statutes, was a *scire facias* given in such a case as this. (Tidd's Pr., 1007, 1056, 1059; Graham's Pr., 806 to 815.) The plaintiff could enforce his judgment in all respects as if the defendant was living.

2d. Was the sale to Pratt void, because notices of the sale were not posted in three places in the town for six weeks before the day of sale?

It was provided by the 2 R. S., § 49, 618, 4th ed., in force when the sale in question was made, that the omission of any sheriff to give the notice of sale required by law, or the taking down, or defacing of any such notice, when put up, shall

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not affect the validity of any sale made to a purchaser in good faith, without notice of any such omission or offence.

Section 46 (2 R. S., 4th ed., 617), imposes a penalty of \$1,000 upon any officer selling without notice, or in any manner other than as directed by law.

Section 48, p. 618, 4th ed., gives a penalty of fifty dollars against any person convicted of taking down, or defacing notices of sale.

These provisions dispose of the objection of the plaintiff's counsel, provided Pratt was a purchaser in good faith without notice.

The judge finds that he purchased without notice of the irregularity of the posting of the notice, and it only remains to inquire whether he was a purchaser in good faith.

Pratt was plaintiff in the judgment, and as such chargeable with notice of all errors and irregularities in the judgment or in the execution. This was held as long ago as 1804, in *Simmonds v. Catlin* (Col. & Cai. Cases, 346). As to all such defects he cannot claim to be a purchaser without notice, and hence in one sense not a purchaser in good faith.

But as to irregularities in the proceedings by the sheriff to sell, he is no more chargeable with notice of them than a stranger to the action.

It is true the court may, on motion, set aside the sale on account of such irregularities and order another. And this in all cases may be done after purchase by a person not a party to the judgment. But when the party injured lies by until the sale has been consummated, or until the time for making a motion has gone by, the purchaser, although plaintiff in the judgment, must be treated as a *bona fide* purchaser. (*Mohawk Bank v. Atwater*, 2 Paige, 54; *Jackson v. Newton*, 18 J. R., 355; *Cunningham v. Cassidy*, 17 N. Y., 276.)

But if he is not, and if he has assigned the certificate or a redeeming creditor has acquired his interest for value paid, then the defendant, the judgment debtor, cannot assail the title of such purchaser or creditor, by reason of defects or

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irregularities in the proceedings to sell. (*Jackson v. Roosevelt*, 13 J. R., 97 ; 8 J. R., 361 ; 13 J. R., 536.)

In *Olcott v. Robinson* (20 Barb., 148), the question of the validity of the sale of real estate, without compliance by the sheriff with the requirements of the statute as to notices of sale, was presented, and the sale held void because of defect in the notice.

It does not appear in that case whether the plaintiff was the plaintiff in the execution on which the sale was made; but it does appear that the defendant was the purchaser at a sale on a previous judgment of the same premises.

This judgment was reversed in the Court of Appeals (21 N. Y., 150), expressly on the ground, that the sheriff had given the notice required by law.

In neither the Supreme Court nor the Court of Appeals, was § 49 above cited, referred to, or commented on. .

If I am right in supposing that covers just such a defect as was insisted on in that case, it was decisive of it. But the Supreme Court seem to have considered the statute as imperative and not directory, and hence a failure to comply with it fatal to the title. Such a construction would be fatal to half the sales of property made. Instead of requiring a defendant to take advantage of irregularities in sales promptly, it enables him to lie by until ejectment is brought against him, even till near the running of the statute of limitations, when the witnesses being dead and the evidence of the proceedings lost, he may insist on the defects in the proceedings to sell and defeat the purchaser's title.

The language of § 49 protects *bona fide* purchasers without notice.

A *bona fide* purchaser is one who purchases for an honest, legitimate purpose, as contradistinguished from one who purchases for some fraudulent or improper purposes; and hence every person buying at a sheriff's or constable's sale for the purpose of satisfying an honest debt is a *bona fide* purchaser.

One who buys and pays nothing is not in any legal sense a

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purchaser. But satisfying an execution to the extent of the bid, is such a payment as constitutes the creditor a *bona fide* purchaser; especially must this be true, after twenty years have elapsed, the lien of the judgment gone and the debt itself satisfied by mere lapse of time.

No court would assume at this late day to revive the lien of the judgment and enforce it against the land.

The statute (2 R. S., 5 ed., 658, § 98), expressly forbids such interference as against subsequent *bona fide* purchasers or incumbrancers.

I am of opinion that the statute prescribing the manner of selling personal or real estate is, as to most of its provisions, merely directory. And non-compliance with them does not affect the title of a purchaser.

When a sale is made before sunrise, or after sunset, when real and personal property are sold together, or personal, consisting of a variety of articles, is sold as one parcel, the purchaser, though he purchases in good faith, is presumed to know the law, and that such sales are in violation of law.

But whether the sheriff has posted and published the notice of sale for the time required by law, he cannot ordinarily know, and he has no means afforded him by which he can inform himself on the subject; he must act, therefore, upon the presumption of the proper performance of official duty.

The counsel for the plaintiff insists that Pratt did not pay the sheriff his fees upon the sale to him of the land.

The referee finds that Pratt did pay to the sheriff his fees, poundage and expenses in making the sale. This finding of facts, is in the findings signed by the judge, but is not included in those set out in the case. The former controls us, there being no exceptions to it by the plaintiff.

The finding is doubtless by mistake, as the evidence is without contradiction that the fees, &c., were not paid. I do not deem it very material whether they were or were not paid, and shall not take time to discuss it further.

I am, therefore, of opinion: 1st. That Pratt must be held

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to have been a purchaser, in good faith, without notice of any defect in the notices of sale.

2d. That the statute relating to the time and manner of giving notice, is directory merely, and non-compliance with its provisions does not vitiate the sale, and if it was mandatory, the remedy was by motion.

3d. That if Pratt was not a *bona fide* purchaser, those who purchased from him, and paid value, are to be deemed *bona fide* purchasers, and not having notice, are protected by § 49, above cited.

4th. That the sale, if it was irregular when made, cannot now be set aside, as the judgment is barred, and the debt discharged by the statute of limitations, and the plaintiffs are chargeable with gross *laches*.

3d. Were the proceedings of Davis to redeem the premises from the sale on the Pratt judgment inoperative?

The defects in the proceedings to redeem, relied on by the defendant's counsel, are:

1st. The money was paid to Johnson, the assignee of the certificate, whereas it should have been paid to the purchaser, creditor, or officer making the sale.

2d. Davis did not produce a certified copy of the judgment on which he redeemed; together with a verified copy of assignment, or affidavit of amount due.

It was incumbent on the defendant to prove compliance with the statute, if he relies on the redemption, and the proceedings to redeem are not proved by recitals in the sheriff's deed.

To entitle a person to redeem premises sold on execution, by the statute (2 R. S., 2d ed., 295, §§ 59 and 60), he was required to pay the money to the purchaser, creditor, or officer. And there was no provision permitting payment to any one else.

It was, of course, necessary that some one or more persons should be designated, to whom payments not only might, but must be made. Persons desiring to redeem from such redeeming creditor, should know to whom they can pay, and not be left to incur the risk of finding who may be the assignee of

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the certificate of sale. I think, therefore, that payment to Johnson was not a compliance with the statute.

There is no proof that Davis ever presented to Johnson a copy of the docket of the White judgment, under which he proposed to redeem; or copy of the assignments of such judgment, verified by affidavit; or an affidavit of the amount due thereon, as required by § 60 above cited.

It is proved that Davis had assignments, signed by Pratt, and those acquiring title to the certificate under him; that he held the assignments of a judgment against Theodore Wood in favor of White; that he presented to the sheriff such evidence of his right to redeem as satisfied the sheriff that he was entitled to redeem; but what evidence was presented to him is left unproved, and must be proved, if at all, by presumption in favor of the due performance of official duty.

But that is not enough; the sheriff cannot dispense with any of the requirements of the statute. (*Hall v. Thomas*, 27 Barb., 55.)

It has been held, that the production of the certificate to the sheriff, duly assigned, is a sufficient payment of the amount paid, to the purchaser at the sale. As owner of the certificate, he, and not the purchaser, is entitled to the money paid to redeem. (4 Hill, 608; 1 Denio, 239; 2 Hill, 51.)

The evidence thus given, slight as it is, should perhaps be sufficient.

After an adverse possession of twenty years, in conformity with the deed from the sheriff, the law presumes in favor of the occupant, that the steps necessary to be taken to entitle the holder of the sheriff's certificate, or redeeming creditor to a deed, had been taken. This presumption is essential to the security of titles.

It is not the presumption of due performance of official duty merely, but it is that, together with the presumption of loss of evidence by death, destruction of papers, and other casualties. The authorities are collected in 1 Cow. and Hill's

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Notes, 355 to 367, and fully authorize the presumption after so great a length of time.

Davis and Johnson are dead, and the papers are lost or destroyed. A better illustration cannot be furnished, than this case affords, of the injustice of permitting the title of those in possession to be overhauled after a long acquiescence in the validity of the title; every presumption must be in their favor.

This brings me to the fourth, and only remaining question; whether Davis did acquire a valid title to the land as assignee of Johnson, who owned the certificate of sale through several mesne assignments from Pratt.

To entitle Davis to a deed as assignee of the certificate, the statute (2 R. S., 2d ed., 297, § 69) required that he should cause the execution of all assignments of the certificate to be acknowledged, or proved, as deeds are required to be acknowledged, or proved, and to cause such assignments and certificates of proof to be filed in the county clerk's office.

The Court of Errors, in *Waller v. Harris* (20 Wend., 555), and the Court of Appeals, in *The People v. Ransom* (2 Coms., 490), held this provision mandatory, and of course non-compliance is fatal to the title.

There is no proof, that the assignments were ever acknowledged, or proved, or filed in the clerk's office.

I am of opinion that Davis is not shown, by the evidence, independent of the presumption entitled to a deed.

But the presumption, which I attempted to show under the preceding point, is permitted to be raised, authorizes us to hold that the acts required to be done, to entitle Davis to a deed, were properly performed.

The sale on the judgment being regular, and the time allowed to the debtor to redeem having expired, the plaintiffs have no interests in the premises, unless it may be the naked fee. There is now no right of redemption from the sale on the judgment; and under such circumstances, they have no claim to relief against the defendants, who entered under the

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purchase at the sale on the foreclosure, and who have been holding under that title for more than twenty years.

The judgment should therefore be affirmed. All the judges concurring, the judgment was affirmed.

LOUISA B. HART v. JOHN YOUNG.

(GENERAL TERM, THIRD DISTRICT, DECEMBER, 1869.)

Plaintiff was a married woman, and being in possession of premises belonging to her husband, who had absconded, and while preparing to leave the same, made a contract for a certain sum with the defendant, who held a mortgage on the premises which was due, to remain for a time, and at the end thereof deliver possession to him. In an action by the plaintiff, after performance by her, to recover the sum which the defendant agreed to pay.

Held, the promise to pay was supported by a sufficient consideration.

Plaintiff's performance was advantageous to the defendant, and an inconvenience to herself; being in possession, as wife of the owner of the fee, her agreement to surrender it, was a sufficient consideration to support the defendant's agreement; and her possession as owner of a contingent right of dower was a subsisting right of which she might make disposal by sale.

The plaintiff was authorized (Laws 1860, chap. 90) to make the contract in her own right, and whether she so made it, or for her husband, was a question of fact; and defendant having asked a decision upon the question by the court, when about to submit it to the jury, and the court deciding for the plaintiff,—*Held*, there was no error.

THIS action was tried at the Ulster County Circuit in April, 1868, before Mr. Justice HOGEBOM and a jury.

The action was brought on a contract; and it appeared upon the trial that the plaintiff and her husband lived together upon certain premises situate in the town of Marlborough, Ulster county, which were owned by the husband, and upon which the defendant held a mortgage, the whole amount of which was due and unpaid. The husband suddenly left, and attachments were issued against him as an absconding debtor. After he had been absent for some time, and on or about the 3d of May, 1864, the plaintiff and the defendant entered into

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the agreement stated in the opinion, which was fulfilled by her, and possession of the premises taken by the defendant.

At the close of the testimony a motion was made for a non suit, which was denied, the court holding that there was a question of fact for the jury, whether the plaintiff made the agreement with the defendant as the agent and on behalf of her husband, or on her own behalf and for her own benefit; if as the agent of the husband, that the verdict must be for the defendant; if for herself, she was entitled to recover, to which ruling and decision exceptions were duly taken by the defendant.

The counsel for the defendant stated that he did not wish to go to the jury upon any such question of fact, as the question in the case was one of law. The court then decided that the plaintiff was entitled to recover, and directed a verdict for the plaintiff, to which the defendant's counsel also excepted. The court directed that the exceptions be first heard at General Term with a stay of proceedings.

T. R. Westbrook, for the plaintiff.

E. Cooke, for the defendant.

Present—MILLER, INGALLS and PECKHAM, JJ.

By the Court—MILLER, P. J. The plaintiff in this action was a married woman; and being left in possession of certain premises by her husband, upon which the defendant held a mortgage, upon being called upon by the defendant, in the absence of her said husband, the defendant agreed to give the plaintiff the sum of \$150 if she would remain upon the premises until he came there with a family and put them in possession. The plaintiff remained in possession according to the agreement, and the defendant took possession of the premises by placing a family there.

The defendant seeks to avoid a recovery upon several grounds, which I will proceed to consider. He insists: 1st. That the defendant's promise was without consideration and

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void. This position is based upon the ground that the wife had no possession of the premises to transfer, and that her possession was that of the husband, who alone could dispose of it, and who could hold the defendant as a trespasser, notwithstanding the wife's consent.

The testimony shows that the plaintiff's husband had left two or three weeks previously, apparently having abandoned his family, and the plaintiff was preparing to leave, having already moved away a portion of her personal effects. Her remaining in possession necessarily involved trouble to her, and would be of advantage to the defendant, by enabling him, as a mortgagee, to take possession at once of the premises, thus giving him the entire control at a season of the year when it was of considerable importance to the defendant to commence farming operations, and when the delays of a foreclosure would be detrimental and injurious to his interests. The possession of lands being an interest which is the subject of sale, is an adequate consideration to support a promise to pay for the price thereof. (*Parker v. Crane*, 6 Wend., 648.) And upon the same principle the possession of the defendant, as the wife of the owner of the fee, which could only be cut off and obtained by means of a foreclosure sale or by purchase, I think will support the promise in this case. As her husband was the owner, and the plaintiff entitled to a contingent right of dower after payment of the mortgages upon the premises, her possession cannot be considered as being entirely the possession of her husband, but was a subsisting right, which she was lawfully authorized to sell and dispose of, as she might deem for her interest, and is a valid consideration for the agreement. For the right of the plaintiff thus parted with by her, no action of trespass could be maintained by the husband, whatever his rights may have been otherwise.

2d. It is also insisted that the contract in question as an agreement of the wife, to hold possession, was equally invalid, she being on the premises and acting only as the agent of the husband.

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The plaintiff remained on the premises after her husband had left them, intending and making arrangements to leave them. As already stated, she could only be removed by legal proceedings, as her husband had the lawful title. She had no direct authority from him to act as his agent; nor does it appear that there was any duty to her husband enjoined upon her to remain there, or to enter into any arrangement to surrender the premises to the defendant.

She had in fact a right which was liable to be foreclosed, to remain, and I think under the married woman's act, authority to enter into a contract in regard to any service which she might render on her separate account, and for her own benefit, which justified her, in making the agreement with the defendant, which she attempts to enforce in this action. (S. L. of 1860, chap. 90.)

But conceding that a dispute arises upon the question, whether she assumed to act, or did in fact act, as the agent of her husband, and whether the promise made was for his benefit, the defendant should have gone to the jury as the court decided he might do upon this question of fact.

It is not so clearly manifest in any view which may be taken of the evidence, that the plaintiff contracted on behalf of her husband, as to have authorized the court to hold, as a matter of law, that such was the case. It is true she was left in possession of the premises by her husband, but it does not follow as a necessary sequence that she had no interest of her own, in the subject-matter of the contract, or that she represented him and acted as his agent. If there was any doubt in regard to these facts, it was matter for the consideration of the jury and not the court.

I think there was no error upon the trial, and a new trial must be denied.

New trial denied.

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JULIA A. KING v. ERASTUS B. PHILLIPS.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1868.)

The trustees of a school-district may acquire an interest in land as tenants in common with others.

The trustees of a school-district, built a school-house upon certain premises, and afterward the legislature legalized the site, and authorized the trustees to acquire title thereto, and they thereupon purchased an undivided interest in the premises occupied.—*Held*, the trustees were tenants in common with the other owners.

Whether the legislature has constitutional power to authorize the taking of land for school purposes. *Quere*.

The trustees of a school-district, having possession of a school-house and being tenants in common with the plaintiff and others, of the lot upon which it stood, the plaintiff, while said trustees were absent, the premises locked, the keys in their possession, and the property of the district within, entered through a window and fastened the door against their entrance, and remained in possession; the trustees broke down the door and ejected her, whereupon she brought this suit to recover damages for the forcible entry, &c.—*Held*,

That the trustees were justified in ejecting the plaintiff, and the action would not lie.

That the trustees having taken possession of the *locus in quo*, and being in the occupancy thereof, at the time of plaintiff's entry, their occupancy was good as against their co-tenants.

That the possession of the plaintiff was inconsistent with a user of the property by the trustees; and her entry being made with the purpose to exclude, and followed by an exclusion of the trustees, such entry and occupation were unlawful.

That the trustees, having been for sometime in possession, with the acquiescence of the tenants in common, a license would be presumed in favor of their occupancy, and the plaintiff's remedy for possession, if any, was by action.

It seems, an action may be maintained for the trespass by one tenant in common against another, who, being in possession, is put out of the same by such co-tenant.

The decisions respecting the rights of tenants in common to hold and occupy the common property, as against their co-tenants, classified, and the rights of such tenants in each class stated. *Per MULLIN, J.*

THIS action was brought by the plaintiff to recover damages for forcibly entering into a school-house, in the town and

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county of Onondaga, in May, 1867, of which she was in the possession, and ejecting her therefrom.

The school-house was the property of the trustees of school-district No. 6, in said town of Onondaga, and was erected and standing, at the time of the alleged illegal entry, on a part of the public square in said town, in which the plaintiff and defendant were interested as tenants in common. The manner in which the several parties acquired an interest in the square, was as follows :

In November, 1803, and prior thereto, George Hall and Thaddens M. Wood were owners in fee of a certain lot of land, in the town of Onondaga, containing some six or eight acres, which had been surveyed and laid down upon a map of the village, as and for a public square.

In order to induce the supervisors of the said county of Onondaga to locate in said village the court-house, and other public buildings for the use of the county, Hall and Wood proposed to the supervisors to convey said tract of land to said county, on the condition that they would erect thereon such buildings, and that the same should be the property of said county so long as it should be used for such purposes, and when the county ceased to use said premises for such purpose, the title should revert to the said grantors.

The supervisors accepted the offer upon the conditions aforesaid, and the said Wood and Hall did, thereupon and on the 2d November, 1803, convey said premises to said county, by deed, upon the conditions above mentioned, and the supervisors erected on said premises a court-house and other buildings, and continued to occupy the same until the removal of the county seat to the village of Syracuse, more than thirty years before this action.

From that time, the supervisors had not occupied the said premises. On the 2d December, 1864, the board of supervisors of said county, by a regulation duly passed, at a meeting thereof, declared that it made no claim to said premises, by virtue of the grant aforesaid.

The above named grantor, Wood, died, in 1826, and his

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wife in 1854, leaving seven children, of whom the plaintiff was one.

The plaintiff was the owner, as the heir of her father, and as purchaser from others of said heirs of five thirty-second parts of said premises.

George Hall, as one of the heirs of George Hall, one of the original grantors to the county, was owner of one undivided eighth part of said premises.

At some time prior to the 1st April, 1867, a school-house was erected on said premises, so as aforesaid conveyed to the board of supervisors, but at what time did not appear. It was occupied as such down to the time of the entry of the plaintiff, as hereinafter mentioned, and subsequently thereto.

In 1865, or 1866, the plaintiff commenced an action of ejectment against the trustees of said district No. 6, to recover her undivided share or interest in the said premises; and such proceedings were had in said action that, on the 1st day of June, 1866, judgment was recovered by her adjudging her entitled to five thirty-second parts of a portion thereof, viz. : of that portion which the school-district occupied. It did not appear that any writ of possession was ever issued or executed.

At a meeting of the inhabitants of said school district No. 6, held on the 18th August, 1866, a resolution was passed abandoning the public common (which meant the premises in controversy in this suit), as a school-house site.

On the 16th April, 1867, an act was passed by the legislature, entitled : "An act to legalize the site of the school-house in school district No. 6, of the town of Onondaga, and to enable the trustees of said district to acquire the title to the lands now used for such site, and such other lands as may be necessary for the same."

The first section of said act legalized the location of said school-house on the public square.

The second section empowered the trustees to acquire title to the land on which it stood, and such other lands as might

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be necessary, in the manner prescribed in chapter 800 of the Laws of 1866.

George Hall and wife executed and delivered to the trustees of said school-district a deed of the land described in the deed of his father and Wood, to the supervisors.

This deed purported to bear date the 1st May, 1867, and expressed a consideration of \$200, and was recorded the 7th May, 1867.

On the 6th May, 1867, at a meeting of the inhabitants of said school-district, a resolution was adopted authorizing the trustees to purchase the interest of said Hall, in said premises, for the school-house site, for the sum of \$200.

There had been, it would seem, an understanding between the plaintiff and the trustees that they would surrender to the plaintiff possession of the school-house and premises if they did not, before that time, acquire title thereto. This was not done; and on the 10th May, 1867, the plaintiff demanded possession of the said premises, and it was refused on the ground that they had acquired title thereto from Hall, and the location of the school-house on the public square was legalized by the legislature.

On the morning of the 13th May, 1867, the plaintiff, in behalf of herself and the other heirs of Thaddeus M. Wood, went to the school-house about four o'clock, and finding it locked, raised a window, passed through, and changed the locks so that they could be locked on the inside, but not unlocked on the outside, and continued in possession during the day.

In the school-house, at this time, were books, &c., belonging to the scholars, and property belonging to the district.

During the day of the 13th, a meeting of some of the male residents of the district was held, and it was concluded to take possession of the school-house forcibly, if necessary, and remove the plaintiff therefrom.

The defendant and his co-trustees were selected as the persons to enter and put out the plaintiff that night, and they accordingly went to the school-house, broke it open, entered,

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and put out the plaintiff, using no more force than was necessary to accomplish the object.

For this forcible entry and putting out, this action was brought.

It was tried at the Onondaga Circuit in February, 1868. The plaintiff was nonsuited. The motion to set aside the nonsuit and for a new trial was ordered to be heard in the first instance, at the General Term, and, in the meantime, judgment was suspended.

S. D. Dillaye, for the plaintiff.

W. H. Gifford, for the defendant.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—MULLIN, J. It will be seen from the foregoing statement of the facts of the case, that while the plaintiff, in her action of ejectment against the trustees, claimed to recover an undivided interest in the public square, she in fact recovered an interest in that portion of it only occupied by the trustees, which was a strip some 110 feet long by forty-one feet wide; and it was into that part she entered and from which she was ejected.

It is not established by the judgment in the ejectment suit that plaintiff has title to any part of the public square, except the school-house lot.

The defendant establishes a title to an undivided interest in the whole square.

The plaintiff and the trustees are tenants in common of the school-house lot if the trustees can legally take an interest merely, in land on which to erect a school-house, instead of a perfect legal title.

By 2 R. S., 5th ed., 109, § 100, the inhabitants of a district, when lawfully assembled at a district meeting, have power to designate a site for a school-house, and to lay a tax to purchase or lease a suitable site for a school-house, and to build, hire or purchase such school-house.

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The superintendent of public instruction is clothed with the power of supervising the action of district meetings and of the trustees of districts, and he has from time to time laid down regulations for their government, which have, to a certain extent, the force of law.

The courts are not bound by his decisions, but they are treated with the highest respect, and, unless clearly erroneous, are followed.

Amongst other rules laid down by the superintendent is this, that money raised by tax cannot be applied to the purchase of land for a school-house until a valid title is obtained. (See Code of Public Instruction, published in 1856, p. 54.)

At page thirty-two of the same work it is decided, that a district will not be permitted to acquire a site for a school-house by perpetual lease.

At page 223 it is said, there can be no partnership in the erection of a school-house, which will prevent the district from controlling it entirely for the purposes of a district-school; and that a tax cannot be raised for building a house for the joint use of a church and school-house, or even an academy and school. But a building may be erected by a district, jointly with a church corporation, or person, provided the entrances to the apartments for the use of each is from the outside, and not through the other. (See cases collected from the Massachusetts and Connecticut reports on pages 223, 224.)

There is nothing in the law, or the directions of the superintendent, or the decisions of our courts, prohibiting the trustees of a school district from acquiring an interest in real estate as tenants in common with others.

If the land held in common is sufficient in quantity, and the interest of the district is large enough to justify the belief that in the partition, land sufficient for the use of a school-house will fall to the share of the district, or the co-tenants will permit the district to use a portion for the purposes of a school-house, there is no reason why it may not acquire such an interest.

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But if it were illegal, the act of April, 1867 made it legal, and clothed the district with the rights of a tenant in common.

It is not necessary for the purposes of this case, to inquire whether the legislature has the power to authorize a school-district to acquire title to a site for a school-house, against the consent of the owner, as being taken for the benefit of the public. No such title has been acquired by this district, or attempted to be acquired by the trustees.

And while it may be the law, that the act authorizing the taking of private property for public use is constitutional, when it provides for making compensation by tax, without actually paying down the damages before there can be a right of entry, yet it is at least necessary that the party authorized to take, should have instituted proceedings for the purpose of taking, and designated the property proposed to be taken.

It has never been held, that because the general railroad act authorizes the taking of property for the use of a railroad, that a company can construct its road over my land, and operate without taking any steps to acquire title to it.

The trustees, although authorized to acquire title to the school-house lot, could not occupy forever without taking steps to perfect their title. The owners of the land had the right to eject them, unless they got title to the school-house lot, and paid the damages resulting from the taking.

I apprehend, that before the passage of the act of 1866, (chapter 800, of the Laws of that year), it was not understood by the profession, that land could be taken for sites for school-houses without the consent of the owner.

The superintendent of public instruction so understood the law, as he says in the Code cited (*supra*, p. 221): "It is greatly to be preferred, that the district should obtain an indefeasible estate in fee simple; but inasmuch, as there is no compulsory process provided by the laws of this State, by which the title to land for school purposes can be transferred when the owner is unwilling, etc., etc."

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The question is still an open one, whether the legislature has the power to authorize the taking of land for school purposes under the constitution.

I have said that the act of 1867 made the trustees tenants in common with the plaintiff, if it should be held, that before that statute the district could not acquire a partial title to the site of its school-house. I say this, because if the erection of the school-house on the public square, without acquiring a title to the land was illegal, the owners could, of course, instantly enter and eject the trustees.

But when the location was made valid, then the district had the same rights an individual would have under like circumstances.

If an individual had erected a building on the square and had occupied for a number of years, he would be deemed lawfully in possession as tenant to the true owners if he had no higher interest. If after such a continued occupancy he should acquire a title to an undivided share of said square, then he would be lawfully in possession as tenant in common with the rest of the owners.

It may not be correct, therefore, to say that the statute of 1867 made the trustees tenants in common ; but making the location of the school-house lawful upon a site not owned, and authorizing them to acquire title by adverse proceedings, it was surely competent for them to agree with the owners to buy in their shares, and thus acquire a complete title as soon as all the owners conveyed all their separate interests.

On acquiring the interest of Hall therefor, they became tenants in common with the plaintiff in the school-house lot.

Being tenants in common, the first question is, whether plaintiff could legally enter into the school-house and hold the trustees out.

The possession of one tenant in common of either real or personal property is the possession of the others. (1 Greenleaf's Cruise, 872 ; 4 Kent, 370.)

Hence one cannot maintain an action against another for merely keeping possession from him. If one attempts by

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force, the one having the possession may defend it by such force as is necessary to its protection.

It must necessarily follow that there cannot be a right to take by force and a right by force to resist the taking existing in different persons at the same time.

Hence it is in the case of personal property, that one tenant in common cannot take it from his co-tenant by force, yet if he can get possession without a resort to force, then he can hold it and protect his possession by force. (Coke on Litt., 199 b.)

When personal property is indivisible, and for that reason cannot be partitioned, there is no way in which one of several owners can have the use of such property if the other being in possession refuses to surrender it. (*Hyde v. Stone*, 9 Cow., 230 ; same, 7 Wend., 354 ; 3 Kern., 173 ; *Gilbert v. Dickerson*, 7 Wend., 449 ; 9 Wend., 338 ; 2 J. R., 468.)

Real estate is governed by different rules.

If one tenant in common takes possession of the entire property and keeps his co-tenant out, the latter may resort to his action of ejectment, establish his title, and be put into possession with his co-tenant. Having done this he may apply for a partition of the estate, and thus be put into actual possession of his share ; or if a partition is not practicable, then it can be sold and the proceeds divided.

It is the right of a co-tenant to enter upon any part of the land unoccupied by the others and keep possession until actual partition.

But can he enter upon that part actually in the possession of his co-tenant either by force or when the latter is temporarily absent without any intention of abandoning the possession. (Comyn's Dig, Estates, K. 8.)

There is such a conflict of opinion on this question that it would be of no service to enter into an examination of the cases. Most of them may be reconciled by attending to different states of facts on which the adjudications were made.

They may be divided into several classes.

The first includes those in which the property owned in

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common is such as to admit of joint occupancy without unreasonable interference with the rights of each other.

The second includes those cases in which there cannot be a joint occupancy consistent with the rights of either.

The third includes those in which there has been an occupancy of part by one, with the assent express or implied of the others.

In cases within the first class, each has a perfect right to enter and occupy, and the entry does not give a right of action to his co-tenants, unless the latter is ousted, or his property is put off the land. (*Mumford v. Brown*, 1 Wend., 52.)

In cases within the second class, one tenant in common cannot enter and occupy, with or without force, so long as his co-tenant is in the actual possession. (*Erwin v. Olmsted*, 7 Cow., 229.) While the right of entry may be said to exist in this case, as fully as in the other, the law, in order to prevent violence or disorder, requires that the right shall be enforced in a legal and peaceable manner. Hence, it gives the right to the one in the actual possession to defend it by force.

In cases within the third class, the tenant in possession will hold it until the right to occupy is terminated in a legal manner; and when that is done, the right of the other tenant to enter will depend on whether the case is brought within the first or the second of the classes above mentioned. (4 Kent, 370.)

As I shall have occasion, in the discussion of another question in the case, to refer to authorities, I will not employ time in alluding to them here.

The plaintiff, on the trial, established title to the school-house only. The question, therefore, is not here, whether she could lawfully enter on any other part of the public square. It is whether she had the right to enter the school-house, of which the trustees had, for several years, the exclusive possession, and of which they were at the time in the actual possession, having the key of it in their custody, and property belonging to the district within the building.

Possession by the plaintiff (because entry, without occupancy, would be of no value to her), would be inconsistent with user by the trustees for the purposes of a school-house.

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and, therefore, in my opinion, she did not have a right of entry and occupancy.

I do not think that mere entry by one tenant in common, upon the common property, is *per se* unlawful. It only becomes so when it is made with the intention of excluding his co-tenant, and, upon entry, he excludes him.

I am also of the opinion, that we must assume, in this case, after so long an acquiescence in the exclusive occupancy of the school-house lot by the trustees, with the knowledge of the heirs of Wood and Hall, that a license was given for such occupancy, and the plaintiff could not thereafter enter and occupy with the trustees without their assent. Her remedy was by action, and not by force or artifice.

I come now to the question whether, if one tenant in common, enters upon the property held in common, an action of trespass will lie for such entry.

If one tenant in common puts out of possession his co-tenant, or prevents him from entering, when an entry would be lawful, it is well settled that ejectment lies. (Coke's Lit., 199 b. 200; Comyn's Dig., Title Estates, k. 8; 1 Chitty's Pl., 180.)

So he could, at common law, have trespass for the mesne profits. (*Goodtitle v. Tombs*, 3 Wils, 168.)

It would seem to be a logical inference from these propositions, that if these forms of actions can be maintained in these cases, trespass may be maintained in any other case when one joint tenant is unlawfully put out of possession of the joint property by another.

Chitty, at the page cited, *supra*, says: "If one tenant in common, disturb the other in possession, trespass, *quare clausum fregit*, may be supported; and though trespass does not lie against a tenant in common for taking the whole profits, yet if he drive out of the land any of the cattle of the other tenant, or hinder him from entering or occupying the land, an action of trespass, *quare clausum fregit*, or an ejectment may be supported.

It was held in *Murray v. Hall* (62 Eng., C. L., 439), that

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trespass lies by one of several tenants in common, against his co-tenant, when there has been an actual expulsion.

The Supreme Court of Massachusetts in *Keay v. Goodwin* (16 Mass., 1), held that if one of several tenants in common occupy separate parts of the common property, trespass will lie by the one against the others who remove the personal property of the former therefrom against his will.

The action was brought for breaking and entering plaintiff's close, and carrying away his boards.

Defendant pleaded that the *locus in quo* was the property of himself and several other persons, tenants in common; that his co-tenants had consented to his use of it for piling boards upon until the plaintiff entered and himself occupied it for piling boards upon; and that defendant entered and removed plaintiff's boards, as he lawfully might. The plaintiff replied that the *locus in quo* had been assigned by the co-tenants to one Wise, one of their number, as a piling place, and that he (plaintiff) entered and occupied as Wise's tenant.

The defendant admitted that Wise was one of the co-tenants, and alleged, that before the supposed trespass, he conveyed his interest to Littlefield and Prim. Plaintiff admitted the conveyance, but alleged, by way of rejoinder, that they never entered. There was a surrejoinder and demurrer.

WILDE, J., delivering the opinion of the court, says: "Wise had a good right to occupy the *locus in quo*, and independently of the agreement for the separate occupation, the defendant had no right to disturb him in his possession."

It will be perceived that the property was capable of occupancy by several of the tenants, and the right of one to appropriate a part, without any authority from his co-tenant, and to retain it without interference from any of his co-tenants, is distinctly asserted.

The learned judge proceeds as follows: "If there be two tenants in common of a dwelling-house, and they severally furnish and occupy different apartments, one co-tenant has no

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right to disturb the other's occupation by removing his furniture, and trespass would clearly lie for such removal."

Such an arrangement would operate *pro tempore* as a partition of the property, and, after that, each would have the right to occupy his portion without interference from his co-tenant, and the case would be within the third class above mentioned.

The judge then says: "We therefore apprehend it to be very clear that the plaintiff, as tenant at will of Wise, had good right to enter and pile his boards in the place allotted to him for that purpose, and that without such allotment he had as good a right as the other tenants in common thus to occupy, and they had no right to remove his boards or expel him from the possession."

That is to say, when one tenant is lawfully in possession, he cannot be driven out by another, having no better right to the possession than himself. The ground of action in such case is the expulsion, and not the entry.

In a subsequent clause of the opinion, this view of the rights of the parties is repeated; the judge says: "The defendant, in the case before us, had no right to oust the plaintiff, nor had any one such a right except Littlefield or Prime (the grantors of the co-tenant who admitted plaintiff to possession); and although no action lies against the defendant, he being one of the tenants in common, for breaking and entering the close, or for any injury done to the common property, yet the removal of the plaintiff's boards was a trespass for which this action well lies."

The mere entry is lawful, but any interference with the rights of another tenant subjects him to an action.

With great deference to the opinion of the learned judge, I think he is mistaken when he says one tenant in common is not liable to his co-tenant for an injury to the common property. He is liable for the destruction of personal and for waste committed on real estate held in common. (Coke on Lit., 199 (b.); 2 R. S., 334, § 3; same, 335, § 11; 8 Term R., 145; Comyn's Dig., Title Estates, K. 8; *Maddox v.*

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Goddard, 3 Shep., 218; *Odiorno v. Lyford*, 9 N. Hamp., 502.)

SAVAGE, J., in *Erwin v. Olmsted* (7 Cow., 229), said that one tenant in common has no right to enter and oust his co-tenant from possession. If he does, trespass *quare clausum fregit* lies.

This question was not necessarily up for decision, but it is entitled to great respect as the opinion of a distinguished judge.

He does not hold an entry alone the ground of the action, but it is the entry and ouster that constitutes the trespass. (*McGarrel v. Murphy*, 1 Hilt., 132.)

WELLS, J., in *Van Orman v. Phelps* (9 Barb., 500) says: If Land was tenant in common with the plaintiff of the premises in question, he had the same right to take the hay (which grew on the common property) as the plaintiff, and if the defendants, in taking the hay, acted under the directions of Land, trespass will not lie against them. In other words, one tenant in common is not liable in trespass to his co-tenant, for appropriating to his own use the products of the common property. But this has no bearing on the question, as to the liability for entering and ousting a co-tenant. It is only another application of the rules applicable to personal property, owned by several in common, as to which, taking the exclusive possession by one, does not give a right of action to another tenant in common.

In *Duncan v. Sylvester* (11 Shep., 482), an action on the case was held to lie by one tenant in common of a salmon fishery, against another who excluded him from sharing in it.

In *Booth v. Adams* (11 Vt., 156) it is held, that one tenant in common cannot maintain trespass against his co-tenant, unless he is expelled from, or hindered in the enjoyment of the common property.

It is laid down in Bacon's Abridgment, Title Joint Tenants, and Tenants in Common, that :

One tenant in common may offend against the statute against forcible entries and detainers, either by forcibly eject-

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ing, or forcibly holding out his companions ; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry, in no way excuses the violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor is good.

If this is the law, the entry of one tenant in common upon his co-tenant, peaceably in possession, is unlawful. Being unlawful, it is of very little consequence what remedy is given for punishing the wrong doer.

There are a few cases, in which it would seem to have been held, that trespass *quare clausum* would not lie by one tenant in common against another ; but as I have not access to the books, I am unable to say whether they assume to overrule the cases to which I have referred, or whether they turn on some peculiar state of facts, or upon local legislation. I think, upon principle, as well as upon authority, an action of trespass *quare clausum* may be maintained by one tenant in common against another, when being in possession he is put out of possession by such co-tenant.

Assuming that trespass will lie in favor of one tenant against another, it remains to inquire whether what was done by the defendant, was such a tortious act as made him liable as trespasser.

The mere entry by either was lawful ; and for it neither can maintain an action against the other. (*Allen v. Carter* 8 Pick., 175 and 177.)

The defendants were, at the time of the entry of plaintiff, and of their entry upon her, and for several years previous, had been in the possession of the school-house and lot, with the acquiescence, if not direct assent of the plaintiff.

This entitled them to the exclusive possession, and the plaintiff could not lawfully enter, and occupy the school-house with the trustees. And being in possession they had the right to remove the plaintiff, leaving her to remedy by partition, to obtain her portion of the property.

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If I am right in these views of the law, the plaintiff was rightfully nonsuited.

Motion for a new trial should therefore be denied, and judgment ordered for defendant.

All the judges concurring, the motion for a new trial is denied.

New trial denied.

NORRIS WINSLOW, Respondent, v. HENRY FERGUSON, Appellant.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1868.)

Defendant made a general denial, except as expressly admitted, to a complaint on a promissory note, payable to bearer, and averred that the note was obtained by fraudulent representations; that it was not given to plaintiff, and defendant had no knowledge, &c., whether it had been delivered to him before maturity for value; and denying that plaintiff was a *bona fide* holder, averred that if he took it at all, it was with notice of the circumstances, &c. Plaintiff on affidavits showing, that he had bought the note before maturity, in good faith, for a valuable consideration, without notice of a defence, and that he was the owner thereof, moved to strike out the answer as sham and irrelevant; but did not, for the purposes of the motion, dispute defendant's averment of fraud.—*Held*, an order striking out the answer as sham must be reversed.

If the averments in defendant's answer, which were contradicted by the affidavits, were untrue, the whole defence must fail; but if plaintiff conceded the fraudulent inception of the note, he assumed the *onus* of showing the falsity of such averments, and this he might not do by affidavit. Section 152 of the Code, does not permit a part of an entire answer or separate defence to be stricken out as sham. Per MULLIN, J.

THIS was an appeal from an order made at Special Term, held in Onondaga county, striking out the answer of the defendant as sham and false.

The facts were these:

The plaintiff sued upon a promissory note, made by defendant for the sum of \$296, payable to the United States Lightning-rod Company, or bearer, three months from date, with interest.

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The complaint alleged the making of the note, and the delivery to the payee, and its transfer before maturity for a valuable consideration to the plaintiff, presentment, &c.

The complaint is verified by the plaintiff's attorney.

The defendant in his answer denied each and every allegation in the complaint, except as thereafter expressly admitted. It was further alleged by defendant that before the making of said note, three persons whom he names, called at his house and falsely and fraudulently represented themselves as agents for a certain insurance company named by them, and by false and fraudulent representations induced him to allow them to put lightning-rods on his buildings, and to agree to insure his buildings and the contents thereof, in said company; that subsequently other agents of said company called upon him, and by other false and fraudulent representations procured from him the note in suit, for the payment of the lightning-rods put on his buildings, and the premiums on his insurance. That said note was given for a much larger sum than was due, and was not delivered to the payee named therein, but to the persons claiming to be the agents of the lightning-rod company.

The defendant alleged that he had not sufficient knowledge or information to form a belief whether said note was delivered to the plaintiff before maturity for value, and he denied that the plaintiff was a *bona fide* holder or owner thereof, and alleged that he took said note, if he took it at all, with notice of the facts showing the defendant not liable thereon.

There was served on the defendant's attorney, for the purposes of the motion, an affidavit made by the plaintiff, in which he testified that he bought the note in suit of one D. E. Belknap (who held it and claimed to be owner thereof), before maturity, in good faith, for \$251.62, without any knowledge or information or suspicion that there was any defence thereto, and that he was, at the time of making said affidavit, the holder and owner thereof.

The plaintiff served, for the purposes of the motion, which was to strike out as sham, irrelevant and false, the affida-

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vit of John F. Moffat, who was cashier of the Merchant's Bank, in the name of which the plaintiff did business as a private banker, by which it appeared that said Moffat was present at the purchase of said note, and the affidavit repeated the statements in the plaintiff's affidavits.

No affidavits are offered on the part of the defendant.

The motion to strike out the answer as sham and false was granted, and from this order the defendant appealed.

Matthew Hale, for the appellant, with other grounds for reversal, made the following points :

The answer is not sham.

1. An answer or defence is sham when false, and known by defendant to be so, or not believed by him to be true. Bad faith is an essential element of a sham answer. (*Garvey v. Fowler*, 4 Sandford, 665; *Benedict v. Tanner*, 10 How., 455; *Darrow v. Miller*, 5 id., 247; *Bailey v. Lane*, 13 Abb., 354; *F. and M. Bank v. Smith*, 15 How., 329; *Littlejohn v. Greeley*, 22 How., 345.)

2. In this case the truth of the answer is not questioned. The allegations of fraud are not, any of them, denied, but all stand admitted. The only part of the answer which the moving affidavits meet in any respect, is the denial of knowledge or information sufficient to form a belief whether the note was transferred before due to plaintiff, and that is met only by plaintiff swearing to good faith.

The answer was not false, nor any part of it, nor is there anything in the case from which anything like bad faith can be inferred.

3. The case of *Benedict v. Tanner* (10 How., 455) was stronger than this. There the pleadings were not sworn to. The answer alleged a set-off against the payee of the note, and that the note was transferred to plaintiff after maturity. The plaintiff moved to strike out the answer, as sham, upon affidavits showing that the note was transferred to them three months before maturity. The motion was denied by MITCHELL, J., who said, an answer was sham only when it sets

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up matter *known to the defendant* to be false, "not when, as in this case, he sets up a fact not strictly within his own knowledge; but what he may be able to prove by witnesses; who might state the reverse of the plaintiff." (P. 456.)

Wirgman v. Hicks (6 Abb., 17, N. Y. Superior Court), was a suit on a promissory note. Answer, alleged fraud in obtaining the note, and denied, upon information and belief, that plaintiffs gave value for the note, or that they were *bona fide* holders. Plaintiffs moved to strike out upon affidavits, alleging that they were *bona fide* holders for a valuable consideration, paid by them therefor in cash; that they purchased the same before maturity, and without notice, and also stating admissions and promises made by defendant. The affidavits, on the part of defendant, denied the admissions and promises alleged, but not the statement as to the *bona fides* of plaintiff. BOSWORTH, J., denied the motion, saying that the defendant had "a right to have those facts established by a jury."

4. The order striking out defendant's answer is thus shown to be contrary to law and authority. Not a single word in the answer is shown to be false. The fraud alleged is not denied. The defendant denies knowledge or information sufficient to form a belief as to the alleged transfer to plaintiff for value, and before due. The law allows him to use this form of denial. It is not pretended that he had such knowledge or information. And still, upon moving affidavits which do not, even if taken as absolutely true, show the defendant to have answered falsely in any particular, his defence is stricken out, and he is convicted of having been guilty of swearing to a *sham* answer, "one known to him to be false."

The cases, where a denial in this form has been stricken out, are all where the matters of which the defendant denied "knowledge or information sufficient to form a belief," were matters necessarily or presumptively within his knowledge. (11 How., 163; 12 id., 153; 4 Sandf., 708; 1 Abb., 254; 8 How., 28; 15 Abb., 346, *n*; 2 E. D. Smith, 48.)

Plaintiff is a *bona fide* purchaser, if at all, to the extent of

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what he paid, and the fraud being admitted, can in no event recover more than he paid and interest. (*Edwards v. Jones*, 7 C. and P., 633; *Williams v. Smith*, 2 Hill, 301; *Youngs v. Lee*, 18 Barb., 187, 193; 2 Kern., 551; *Caldwell v. Hicks*, 37 Barb., 458.)

We think it clear that the answer is true in fact and good in law, and ought to stand. But we respectfully submit that if there is *doubt* as to its validity, the order striking it out should be reversed and the plaintiff left to his remedy by demurrer, or by moving exclude the evidence on the trial.

Section 152 of the Code is designed to enable plaintiff summarily to get rid of two classes of answers and defences.

1. Sham—"false in fact, *and put in in bad faith*." (ALLEN, J., 22 How., 345.)

2. Irrelevant—"palpably foreign, inapplicable and impertinent to the cause of action, or frivolous. The irrelevancy or frivolousness must be palpable and clear, and *not require argument to establish it*." (ALLEN, J., 22 How., 348.)

The answer in this case was stricken out as *sham*, and we think it clear that it is not so.

And the order cannot be sustained on the second ground, that the answer is irrelevant, because,

1. It is stricken out as *sham*, and the order can be sustained on no other ground.

2. Because the answer is good.

3. At all events, it is not palpably and clearly irrelevant, "so as to require no argument to establish it."

The rule as to what answers are to be stricken out as irrelevant, as quoted above from Judge ALLEN, has the best of reasons to sustain it. To adopt any different rule, would necessarily work mischief and injustice.

1. It deprives a defendant of the right to trial by jury.

2. It enables a plaintiff to win his case by an *ex parte*, affidavit, and avoid a cross-examination; often the best test of truth.

3. It deprives the defendant of the right to appeal to the Court of Appeals (23 N. Y., 162), and enables a plaintiff to get rid of a troublesome answer, and not only deprive a

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defendant of his defence, but cheat him out of his right to an appeal to the court of the *whole* people ; making the General Term the court of last resort, in a matter finally determining the rights of the parties, however important the issue.

4. On the other hand, by denying motions of this kind, except in cases of evident bad faith or improper motives on the part of defendant, plaintiffs are not prejudiced, but are simply compelled to abide the due and orderly administration of justice.

S. H. Hammond, for the respondent.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—MULLIN, J. Whatever other ingredients are necessary to constitute a sham answer, it is certain that falsity is the principal one. And unless the answer in this case is false it cannot be stricken out on motion.

There is no ground for claiming that the part of the answer that sets up fraud in obtaining the note is false. The plaintiff concedes, for the purpose of the motion, that it is true ; but alleges that so much of the answer as charges that the transfer of the note to him was after maturity, or with notice of any defence to said note is untrue. And it is by reason of the falsity of those allegations only, that he seeks to have the answer stricken out.

Under § 152 of the Code, the court is authorized to strike out an answer or defence as sham or irrelevant. Under this provision I apprehend the court is not authorized to strike out a part of an entire answer or put up a separate defence. The whole must be stricken out or none. The power to strike out part of an answer or a defence must be found in some other provision of the Code or rule of practice in force when the Code took effect and not yet abrogated.

If then, the part of the answer alleged to be false in this case, is not so connected with that part which is admitted to be true, as to vitiate the whole answer or defence, then this motion should have been denied. But if the matter alleged to be false, is so connected with the matter admitted

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to be true, as that the latter ceases to be a defence if the matter that is false, is stricken out, then, I think, the falsity being established of such part, the whole should be stricken out. A defence partly true and partly false, the part that is true, standing alone, not forming a defence, constitutes a sham answer, within all the definitions of that term.

The fraud in the inception of the note, is no defence to the note as against the plaintiff, unless the defendants can prove that the plaintiff obtained it after maturity, or with notice of the defence, or did not pay a consideration therefor.

These allegations are contained in the answer; and if they are untrue, then, under the rule stated above, the answer is false, and should be stricken out.

It is a presumption of law that the holder of a negotiable note obtains it before maturity, in good faith, for a valuable consideration.

When the maker, or other party to such paper, proves that it was obtained from him fraudulently, the burden of proof is changed, and it devolves on the holder to prove that he obtained the note before maturity and for value. (*Rogers v. Morton*, 12 W., 487; *Id.* 14 W., 575.)

It is alleged in the answer, and not denied by the plaintiff, that the note in suit was obtained by fraud. It devolved upon him, therefore, to establish the facts which must be proved in order to entitle him to recover.

Under this state of things, the portion of the answer of which the truth is not questioned, is a complete defence to the action.

When the plaintiff shall give evidence to show that he acquired title to the note before maturity, &c., the defendant will be at liberty to prove that he is not a holder for value, &c., although such matters were not alleged in his answer.

The plaintiff, in his complaint, has alleged that he is a *bona fide* holder, &c., and those averments are established, in the first instance by presumption. The fraud alleged in the answer, being admitted, the plaintiff is driven to direct proof of the matters affecting his title, thus alleged.

In this aspect of the case, this motion is, in effect, to per-

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mit the plaintiff to establish his case by affidavits, and to exclude the defence.

It is wholly immaterial whether the part of the answer assailed by plaintiff's affidavits be true or false, the plaintiff is compelled, by reason of the truth of the residue of the answer, to establish a valid title to the note.

The order appealed from should be reversed, with ten dollars costs.

Order reversed.

JAMES H. BUCKLIN, Respondent, v. HELEN M. CHAPIN, Administratrix, &c., of EDMUND G. CHAPIN, Appellant.

(GENERAL TERM, FIFTH DISTRICT, APRIL, 1868.)

An executor or administrator who, after a claim against the estate of the testator or intestate, has been presented to him, delays unreasonably to make objection to it, is not precluded from asserting the statute of limitations as a bar to such claim.

And he may surcharge and falsify, any part of an account, that has become stated in the lifetime of the testator, or intestate, or since his own appointment.

A debtor who allows an account against him to become stated, by omission to dispute the same when presented, does not thereby waive the defence of the statute of limitations. Per MULLIN, J.

An administratrix caused a notice to be published, under an order obtained from the surrogate for the purpose, requiring creditors to present their claims against her intestate's estate, to her attorney. Plaintiff presented his account accordingly, and left it with the attorney, and no objection was made thereto until more than three years after such presentation, when it was rejected by the administratrix; afterward, and when ten years from the time the last item of the account accrued, had elapsed, an order was entered by the surrogate on consent of parties, under the statute, referring the claim to referees for adjudication, and on the hearing before such referees, the administratrix insisted upon the statute of limitations as a bar to a recovery; the referees found for the plaintiff,—*Held*, on appeal, their decision should be reversed.

A reference under the statute (3 R. S., 88, § 86), stands in place of an action, and the entry of an order to refer must be deemed its commencement, for the purpose of determining whether it has been brought within the time limited by the statute.

Service performed for, or property sold to, an executor or administrator, as

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| 1 | 443 |
| 64h | 92 |
| 1 | 443 |
| 85h | 121 |

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such, cannot be deemed or treated as the continuation of a running account with the testator or intestate, in his lifetime.

EDMUND G. CHAPIN was a watchmaker by trade, and carried on business as such at Little Falls, in the county of Herkimer. He occupied for many years, a portion of a store owned by the plaintiff, but upon what terms did not appear.

The plaintiff, was a merchant, and sold groceries and provisions. For several years the plaintiff, and his clerks, boarded with the intestate, and the latter obtained from the store provisions, and other things required for family use.

Chapin in or about 1857, entered into copartnership with one House, in the rectifying and sale of liquors; and they remained in business together until the death of Chapin, the intestate, on November 2d, 1861.

His wife, Helen M. Chapin, was appointed administratrix of the goods and chattels of her late husband by the surrogate of Herkimer county in December, 1861.

The plaintiff kept books of account, on which were charged the goods, &c., received by Chapin, and on the same books were entered certain credits to Chapin, but there were not found by the administratrix any books kept by Chapin, in which there was any account against the plaintiff.

It appeared by the plaintiff's books, that at some time prior to, or on the 12th April, 1856, there was a balance brought forward in favor of the plaintiff against Chapin of \$2,333.31. It is admitted that Chapin received the property charged to him on plaintiff's books, from 12th April, 1856 to the 31st May, of the same year (both days inclusive), amounting to \$26.29.

On the 6th July, 1856, plaintiff charged to Chapin forty dollars, for moneys paid Aldin Bucklin, on his (Chapin's) account.

There was charged to Chapin, on the plaintiff's book, after date of 6th July, 1856, \$180 for rent of the part of the plaintiff's store occupied by C., from 1st of June, 1850, to 1st June, 1856, at thirty dollars per year.

On the 5th November, 1861, being three days after Cha-

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pin's decease, there was charged one dollar for shaving Chapin after his death ; and the sum of \$377, as of the 6th November, for property sold and received.

On the plaintiff's books there was credited as of the 1st August, 1846, a balance due to Chapin from the firm of Staring & Bucklin, in which firm plaintiff was a copartner, the sum of \$18.98. There was also credited to him in each year thereafter, up to 13th June, 1856, one or more items in each year, amounting in all to the sum of seventy-seven dollars.

There was also credited to Chapin \$1,800 for board of plaintiff, 474 weeks, ending on the 11th March, 1856 ; seventy-seven weeks for board of Schuyler, 345 weeks for board of Snell, and four weeks for board of Dickens, making 900 weeks in all, at the price of two dollars per week.

The whole amount of plaintiff's account was.... \$2,592 59
The whole amount of his credit to Chapin was.. 1,877 00

Leaving due to plaintiff..... \$715 59

Among the other charges in plaintiff's account, was an item of eight dollars for making an inventory and settling accounts.

The facts relating to this item as claimed by the plaintiff are, that a short time before Chapin's death, and while he was lying sick in his house, the plaintiff was called in and consulted as to his (Chapin's) affairs. House had proposed to buy out Chapin's interest in the firm of Chapin & House, and for which plaintiff wanted \$300. This, House thought too much, and thereupon plaintiff made an inventory of the effects of the firm, and left the same with Chapin, and he also settled some accounts which Chapin had against others. This service was not rendered, as plaintiff swears, at the request of House for himself or his firm ; nor does he swear that he was ever requested to do it, by either Chapin or the defendant ; and the only color for the charge is, that before Chapin's death he had a consultation with defendant on the subject of his (plaintiff's) looking after Chapin's affairs. There was no finding on this fact by the referees. The item of one dollar for shaving after death was rejected.

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The defendant caused to be published, after she was appointed administratrix, a notice requiring creditors to present their claims against the estate of her late husband, at the office of H. Link, Esq., in the village of Little Falls. On the 17th December, 1862, the plaintiff presented an account, the substance of which is given above, and left the same at the office of Link. The defendant made no objection to the account until 3d April, 1866, when she rejected the same.

Subsequently, the parties agreed upon three persons as referees pursuant to the statute relating to the determination of claims against the estates of deceased persons, and the persons so selected were approved by the surrogate of Herkimer county, and were, on the 11th May, 1866, duly appointed referees, to hear and determine the validity of said claim.

The referees, after hearing the proofs and allegations of the parties, found, among other things, that there was a mutual and running account between the parties, and extending from 1845 to 1861 on the part of the plaintiff, and from 1846 to 1856 on the part of the estate.

And that by reason of the presentation of the account by the plaintiff to the defendant in 1862, and the omission to dispute or reject the same until April, 1866, the account became a stated account, and was conclusive on defendant.

The defence principally relied on, was the statute of limitations, and it would seem to have been the opinion of the referees, that because the account became stated, the statute of limitations was no longer a defence to plaintiff's claim, and that the charges for property sold subsequent to Chapin's death were allowable on the same principle.

There was judgment for the plaintiff for the balance of his account, after deducting the credits allowed by him to the estate. From this judgment the defendant appeals.

F. Kernan, for the appellant.

G. A. Hardin, for the respondent.

Present—FOSTER, MULLIN and MORGAN. JJ.

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By the Court—MULLIN, J. I will not take time to consider the question, whether on the proof in this case, there was a mutual, open and running account between the plaintiff and defendant's intestate, but shall assume, for the purposes of this appeal, that it was such an account.

To present the question in a way to enable the court to decide it satisfactorily, there should be a finding of sundry facts not found by the referees nor discussed by the counsel. It is, therefore, safer to leave that question to be considered on a future trial, should a new trial be ordered by the court.

The defence mainly relied upon by the defendant is the statute of limitations. The view that the referees took of the presentation of the account by the plaintiff, and of the failure of the defendant to dispute or reject the same, precluded all inquiry by them as to whether or not the statute barred all, or any portion of the plaintiff's claim.

The view of the referees was, that the account became a stated account, and the defendant could not avail himself of the statute of limitations, as a defence to it.

If the referees are wrong in their view of the legal question, the judgment must be reversed, and a new trial ordered.

In references under the Revised Statute, to hear and determine claims against the estates of deceased persons, an executor or administrator is entitled to any defence which was available to his testator or intestate in his lifetime, including the statute of limitations. There is nothing in the form or nature of the proceedings which precludes such a defence. (*Tracy v. Suydam*, 30 Barb., 110.)

The omission of a debtor to dispute the accuracy of an account presented to him within a reasonable time, has no other effect than to enable the creditor to recover the amount of the account without proof of the correctness of any of its items. It is not as was said by SELDEN, J., in *Lockwood v. Thorne* (18 N. Y., 285), an estoppel. The account is still open to impeachment for mistakes and errors. * * The party seeking to impeach it is bound to show, affirmatively the mistake or error alleged. (1 Wait's Practice, 719.)

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Giving to the account stated all the force that can be properly claimed for it, it does not preclude the debtor from insisting upon the statute of limitations as a defence. He cannot dispute the items; but if they had ceased to be legal claims against him, his mere silence cannot infuse life and validity into them. To give it such an effect, would be to give it the force of an estoppel *in pais* which it cannot properly have.

If mere silence is to operate as a waiver of the defence, how is a party to whom an account is rendered correct in its terms, but barred by the statute of limitations, to protect himself?

He cannot deny the correctness of the accounts, and I am not aware of any case that holds him bound to notify the creditor of his intention to insist on the statute. If the debt is not paid the creditors must sue, and then the debtor must avail himself of the statute.

But if it should be held that when an account becomes stated, the debtor cannot insist upon the statute of limitations as a defence, the principle ought not to be extended to an account presented to and not disputed or rejected by an executor or administrator.

This class of persons may pay a debt that is outlawed, but the payment will not be allowed to him in the settlement of his accounts with the surrogate.

Nor can a personal representative revive by an express verbal promise a debt barred by the statute. (*Bloodgood v. Bruen*, 8 N. Y., 362.)

If this cannot be done directly it surely cannot be done indirectly.

The law implies a promise by the debtor to pay an account when it becomes stated. Will the law give to an implied promise a greater force than it permits to be given to an express promise? Certainly not.

Since the Code, a debt that is barred cannot be revived except by a promise in writing or by payments. It would be an evasion of the statute to permit a stated account to revive

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a claim that is barred. The whole object of the statute of limitations would be defeated by the adoption of such a rule.

Section 91 of the Code provides that actions upon contract, obligation or liability, express or implied, must be brought within six years after the cause of action shall have accrued. (Same, § 74.)

The cause of action accrued as to all that part of the indebtedness contracted prior to the death of Chapin, on the 7th July, 1856. The death of Chapin extended the time of commencing the action eighteen months, giving the plaintiff seven years and six months within which to bring his suit.

The reference stands in the place of an action, and the entry of the order to refer must be deemed to be the commencement of the action for the purpose of determining whether an action had been brought within the time limited in the statute.

It was held in *Peck v. Randall* (1 J. R., 165), that the presentation of a claim to the trustees of an absent debtor prevented the running of the statute of limitations because it stood in place of a suit and the trustees could not be sued. The personal representative can be sued, and the reason of the rule ceasing, the rule itself ceases.

The precise point was decided in *Reynolds v. Collins* (3 Hill, 37); BRONSON, J., holding that presentation of a claim to executors did not prevent the running of the statute.

The order to refer was entered on the 11th May, 1866. Nearly ten years had elapsed from the date of the last item before suit was brought. Unless, therefore, there is something in the case to take it out of the usual rule, the whole account which accrued before the death is barred.

It is insisted that the charge for eight days services in making inventory and settling accounts, being within six years from the date of the last preceding item, prevents any part of the account from being barred by the statute.

The account having become stated this item is *prima facie* correct, and hence *prima facie* the whole account is valid.

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But it was competent for the defendant to surcharge and falsify, and thus exclude any article not legally chargeable.

In references under the statute to determine the validity of claims against the estates of deceased persons there are no pleadings, hence the parties only show by their proofs what the grounds of recovery or of defence may be.

The personal representative has an unlimited right to establish by evidence any defence he may have to the claim. He may, therefore, surcharge and falsify any part of an account that has become stated in the lifetime of the testator or intestate, or since his appointment as administrator or executor.

The defendant is at liberty, therefore, to assail the items of the 26th October.

It seems to me, the items under consideration cannot be recovered. There is no evidence that plaintiff was requested by either the defendant or the intestate to perform the service for which the charge is made. The plaintiff himself does not swear to any request.

The service was for the benefit of the firm of House & Chapin, and, presumptively, it should pay for it.

Rejecting this item, then every charge in the account, accruing in the intestate's lifetime, is barred, unless that result is prevented by the charges for wood, flour, &c., delivered after his death.

The service performed for, or property sold to an executor or administrator, as such, cannot be deemed or treated as a continuation of a running account with the testator or intestate, in his lifetime.

At the death, the account is closed ; all future charges are against a different party, who is himself personally liable to the creditor on all contracts made by him in behalf of the estate.

For these reasons, I think the whole of the account that had accrued against Chapin in his lifetime is barred.

There must, therefore, be a new trial.

Judgment reversed and new trial ordered ; costs to abide event.

Gale v. Miller.

JACOB R. GALE, Appellant, v. DAVID MILLER and HAROLD C. GALE, Respondents.

(GENERAL TERM, THIRD DISTRICT, SEPTEMBER, 1867.)

In an action upon a check made payable to bearer, running in a firm name, brought after its dissolution, against G. and M., who were the members thereof, M. only answered, and he averred a combination between G. and the plaintiff, to defraud him of the amount of the check. It appeared upon the trial that G. individually paying an indebtedness of the firm, had thereupon made the check, and afterward for a personal indebtedness of his own, delivered it to the plaintiff; the time of delivery of the check to the plaintiff was in dispute, the latter claimed a delivery before, and M. the defendant, after, the firm's dissolution. The judge connecting the two propositions together, charged the jury that to entitle the plaintiff to a verdict, they must find that the check was issued before the dissolution, and that it passed into the hands of the plaintiff before the dissolution; there was a general exception by the defendant, M., to this charge.—*Held*, there was no error.

The partner's right to issue the check (that is, to make and appropriate it to any purpose) ceased with the dissolution of the firm.

If the check had been made before the dissolution of the firm, and disposed of by G. afterward, it would have been subject in the hands of the plaintiff to the equities existing against it, and such equities would not be a proper subject of adjustment in an action between the plaintiff and the members of the firm. Nor was M. obliged to insist on such equities in such a suit; he might rely upon fraud in the issuing of the note after the dissolution. Per MILLER, P. J.

THE cause was tried in September, 1865, at the Columbia Circuit. It appeared that the defendants, David Miller and Harold C. Gale, were, from the first of October, 1860, until February 22, 1861, copartners in the freighting business, at Livingston station, on the Hudson River railroad, under the firm name of Miller & Gale.

The defendant, Harold C. Gale, was, during the same period, engaged at the same place, in trade on his own individual account.

It was proved by the plaintiff that on the 23d day of January, 1861, said firm of Miller & Gale were indebted to one J. N. Hover in the sum of \$156, for hay sold by said

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Hover to said Miller & Gale; and that at the same time, said Hover was indebted to said defendant, Harold C. Gale, individually, in the sum of one hundred and twenty odd dollars, for goods out of his store, and money borrowed of him by Hover.

The plaintiff also claimed, and introduced the evidence of Harold C. Gale, to establish, that the defendant, Harold C. Gale, then paid to Hover, out of his individual means, the difference between the amount that the firm of Miller & Gale owed him, Hover, and the amount that he, Hover, owed him, Gale, and gave said Hover a bill of his individual account against said Hover, receipted in full of the amount that said firm of Miller & Gale owed said Hover. The defendant, Gale, also testified that at the time of this settlement, he drew the check in suit, for \$156, signed it in the firm name, and retained it in his possession until he turned it over to the plaintiff in the month of January, 1861, in payment of money borrowed of plaintiff by the defendant, Gale, and indorsed the same upon a note for \$200, held by Gale, the plaintiff, against Gale, the defendant. Most of the material facts proved, and claimed to exist, by the plaintiff, were disputed by the defendant Miller, who, alone, defended the suit.

The defendant proved, that nobody but the plaintiff and defendant, Harold C. Gale, had ever heard of the check, until the 25th day of April, 1861, some time after the dissolution of the copartnership, when, without payment ever having been asked from the defendant, Miller, or the bank, it was taken to the office of the attorneys for the plaintiff, and advice obtained in regard to it.

In the meantime, the firm had been dissolved. It also appeared that the check book of the firm being used on a settlement between the partners before the dissolution, the outstanding checks against the firm were brought into the settlement, an original entry, equal in amount to the check in question; in defendant Gale's handwriting, appeared erased on the check book, and the word "cash," written in pencil below it, appeared also erased. At the same time, this check book

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showed that the figures \$156.00, equal to the amount of this check, had been first footed in, in Gale's handwriting, and afterward that footing erased, and another made in Gale's handwriting, excluding the \$156 also, which last footing was erased; that there was a final footing of the checks entered on the check book in Gale's handwriting, which did not include the \$156; that the defendant, Gale, did not inform the defendant, Miller, of the alleged existence of this check, and did not give any information of its existence at the time of the dissolution settlement.

It was also proved, that Gale produced to one Reuben Miller, a list of the outstanding checks of Miller & Gale, and the alleged check in question was not on the list. Also, that there was no date to the indorsement of the \$156 alleged to have been paid by the check, on the note; that the indebtedness of the firm was, at the settlement, assumed by the defendant Miller, and understood and stated to be \$2,046.39. Several witnesses were introduced and sworn, impeaching the character of Harold C. Gale, and his character was also supported by several witnesses.

The defendant, Miller, resisted the payment of the check, claiming that the facts showed a fraudulent combination between the plaintiff and defendant Gale, to defraud him out of the amount of the check; he insisted that the plaintiff, and defendant Gale, were unworthy of credit, and untruly testified to the making and delivery to the plaintiff of the check, at any time during the existence of the copartnership, and that as the copartnership had been dissolved in February, 1861, and no other person but the two Gales were alleged to have seen the check before the dissolution, neither the fact of making, or delivery before the dissolution, was established.

There were several exceptions taken by the plaintiff's counsel on the trial, to the admission of evidence received on behalf of the defendant Miller, and to legal propositions contained in the charge of the judge. So far as material, these are stated and referred to in the opinion.

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The judge, in that part of the charge excepted to, charged the jury, as stated in opinion, that the check must have passed into the hands of the plaintiff before the dissolution, in order to enable him to recover. The jury found a verdict in favor of the defendant Miller. A motion was made for a new trial on the minutes, which was denied, and judgment was entered in favor of the said defendant, and the plaintiff appealed from the order, denying a new trial, and the judgment, to the General Term.

J. Gaul, Jr., for the appellant.

R. E. Andrews, for the respondent.

Present—MILLER, INGALLS and HOGEBOM, JJ.

By the Court—MILLER, P. J. The simple question in this case is, whether the defendant, Miller, is liable in this action? Whether he owes the debt otherwise, or is responsible to his partner for the same or for his share, is a question we are not called upon to decide, and is not in the case now presented to us. These are matters which may be adjusted in another action, perhaps in one between the defendants; and if the defendant, Miller, is liable for this demand, he can be made to pay and cannot escape it. Nor does it follow that the plaintiff must lose his demand unless he can recover in this action. The defendant, Gale, interposes no defence, and a judgment must necessarily be obtained against him; and although it is not important to inquire on that subject, yet for anything which appears, he is quite as responsible as the other defendant. But these are considerations, which should not be regarded in disposing of the legal questions involved in the present case. When this case was heard at General Term upon the facts presented by the plaintiff alone, it was held,* that as the facts showed that the check was made by the defendant Gale, to pay a company debt, and in good faith.

* See 44 Barb., 420.

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and was transferred and held by the plaintiff in good faith, and for a valuable consideration, the action would lie, and therefore that the court erred in granting a nonsuit. The court, however, expressly say, *that if the check was fraudulently issued, it could not have been available*. As the case was then presented, no question of fraud was raised; and we must regard it as presenting the additional question which was severely litigated upon the trial, whether the check was fraudulently issued by the defendant, Gale, and received by the plaintiff. This was the issue made and submitted to the jury under the charge of the judge, and we must consider the questions presented with this changed aspect in the features of the case. The plaintiff claimed that the check was issued before the firm was dissolved, and on the 23d of January, 1861. The defendant, Miller, who alone defended, on the other hand insisted that it never came into existence until the partnership had been dissolved, and until March or April, 1861, and that it was then fraudulently issued by the defendant, Gale, and passed over to his brother, the plaintiff. Upon this question there was, I think, quite a conflict in the testimony, which rendered it proper to submit the case to the jury under appropriate instructions, unless the undisputed facts showed that the plaintiff was entitled to recover, which I shall have occasion to consider hereafter, and in another connection.

The principal questions presented, and the only questions out of which any controversy can arise, relate to the charge of the judge in the changed aspect of the case produced by the introduction of evidence on the part of the defendant, Miller. This charge embraced two propositions; and as the case stood, with the additional evidence introduced by the defendant, as to the fraudulent issue of the check, the rule laid down by the court when the case was before them for review was in no particular violated. The first proposition in the charge, was, that the check must have been issued before the dissolution of the firm; and the second was, that it must have passed into the hands of the plaintiff before the dissolution. These two were blended together, and there was

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but one general exception to the two propositions, so that if one of them was right, the exception was not available. In addition and separately from these propositions, the judge also charged that if the plaintiff received the check in the month of March, he received it after the dissolution of the copartnership, and it would not be a valid instrument in the plaintiff's hands, and he could not recover. As to the first proposition, that the check must have been issued before the dissolution of the firm, I think it was clearly right and proper. By the issuing of the check, was meant the making of it, and the appropriation of it to any particular purpose, which was the question litigated on the trial. The mere signing the check, before the dissolution, of itself, would amount to but little, if it had not been appropriated or issued as a liability of the firm.

The right to issue the check, then, after the dissolution depends upon the authority of a partner to create a liability in writing which did not previously exist. In the *National Bank v. Norton* (1 Hill, 572), it was held that one partner after dissolution cannot bind his copartners even by the renewal of a partnership note. COWEN, J., says: "This is the making of a new contract by one for all the partners after his authority is revoked. During the continuance of the partnership he is entitled to act for all as their general agent. On dissolution he ceases to hold that character, and must be considered as a mere joint debtor. This leaves to him the power of payment in respect to debts due from the firm, but with slight exception, if any; nothing more." (See, also, *Mitchell v. Ostrom*, 2 Hill, 520; *Lansing v. Gaine*, 2 John. R., 300; *Lusk v. Smith*, 8 Barb., 570; *Sanford v. Mickles*, 4 John. R., 224.) Willard, in his excellent treatise on Equity Jurisprudence (p. 727), says: "It is scarcely necessary to add, in concluding this chapter, that the power of one partner to bind the firm ceases with the dissolution."

According to these decisions the defendant, Harold C. Gale, had no right to issue the check of the firm in payment of the partnership debt after the dissolution of the part-

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nership. It was creating a new obligation of the firm, and, under the authorities cited, he could not lawfully bind the firm. If he paid the demand out of his own private funds, it was a proper charge against his copartner, to be settled in an adjustment of their accounts, not included in the settlement made immediately prior to the dissolution. If the check was issued before the dissolution, of course it would alter the case very materially; but if it was issued afterward, then it was issued without authority, and in violation of the principle referred to. This is not a case of a partner who holds a valid debt against the firm, at the time of the dissolution, which he has a right to assign. If such a proposition was suggested on the trial, and a request made to submit it to the jury, we are to assume that it was done. And, in point of fact, the charge, as made, left it to the jury to say, whether the check was lawfully made and issued before the dissolution. But even if the check was actually made before dissolution, I incline to think, that a partner cannot thus privately make a check for a debt he claims, put it in his pocket, make a settlement without referring to it, and then afterward dispose of it. Such a transaction, I think, must be subject to the equities, which may subsequently exist against the check. It must be settled in a suit between the partners, and not in a litigation between them and a stranger. If any equities existed, they were not a proper subject of adjustment in this action. They could not well be tried in a suit, by a third party against the partners, and, I think, that the defendant, who contested the plaintiff's claim, was under no obligation to interpose any such defence. He had a right to rely upon the alleged fraud, in issuing a check after the dissolution of the firm, as a defence. If claims had since arisen, they could be adjusted between them afterward.

As to that portion of the charge which contains the proposition that the check must have passed into the plaintiff's hands after the dissolution, it may be said that it is dependent upon the correctness of the first; for if issued without

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authority, after the dissolution, it necessarily follows that it could not be passed to the plaintiff. As the defendant, Harold C. Gale, had no authority to issue it after the dissolution, and acquired no title thereby, he could confer no better title upon the plaintiff, who received it in payment of an antecedent debt, and was therefore not a holder in good faith, so as to preclude a defence, which existed against the original holder. (*The N. Y. Ex. Co. v. De Wolf*, 31 N. Y., 284. *McBride v. The Farmers' Bank*, 26 N. Y., 454.)

The discussion had, disposes of the portion of the charge adverted to, and it is quite evident to my mind, that it was sound in law, entirely applicable to this case as presented, and assumed by both parties to exist; and could not, under any circumstances, possibly have misled the jury.

It is insisted by the defendant, that the verdict of the jury was erroneous, and that the case is a plain one in favor of the plaintiff. It was not claimed, upon the trial, that there was no disputed question of fact in the case for the jury, nor was any request made to the judge to take the case from the jury or to direct a verdict in favor of the plaintiff, as would have been eminently proper, if the position now taken is maintainable. Both parties appear to have assumed that the question, as to the fraudulent making and issuing of the check, was in the case, and a question of fact for the jury; and I am not prepared to say that it is manifest that they decided erroneously, and entirely contrary to the evidence, or that there is no sufficient evidence to sustain the verdict. The case of the plaintiff rested mainly upon the testimony of himself, and the defendant, Harold C. Gale. If their testimony was to be relied upon, then the plaintiff was entitled to recover, as they testify quite positively to a state of facts, which made out a case in favor of the plaintiff. But this evidence was attacked, especially that of the defendant Gale, whom it was claimed was directly impeached.

Even if the debt was due from the defendants to Hover, or the check had actually been made and issued prior to the dissolution, there was evidence in the case,

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showing that the defendant, Gale, had the control of the funds of the concern, and ample opportunity to pay the debt, or to repay himself, the amount of the check, which he claims was made for that purpose, and from which it might well be claimed that he would have been likely to have done so, and that, in fact, it was actually paid by the defendant, Gale, out of moneys received before the dissolution, and put in circulation after the dissolution, if made before that time. There was, also, proof of statements as to checks made by the defendant, Gale, on the settlement and dissolution, which did not contain the check in question, and which were to the effect that no such check was at that time outstanding; and although the check was entered in the check book, it was erased, and not added in the footing. There was also testimony of Gale's declarations, inconsistent with the idea that any such debt or check had any lawful existence at the time of the dissolution of the copartnership, and evidence of declarations to the effect that he received the check after the dissolution of the copartnership. It is true that much of the testimony to which I have referred, was contradicted; but I think it can scarcely be claimed that there was not some evidence which would justify the position taken by the defendant, Miller, that there was a fraudulent combination between the plaintiff and the defendant, Gale, to defraud him out of this check.

The fairness and good faith of the plaintiff, and the defendant, Gale, the truthfulness of their testimony, and the credit to be given to it, were subjects of serious dispute. It is manifest from the leading features of the case, to which I have made a brief reference, that the controversy between the parties presented questions of fact which it was the peculiar province of the jury to decide, with which the judge upon the trial, even if he had been called upon to do so, had no right to interfere, and which this court has no authority to disturb, as the evidence stands, according to well settled rules of law.

Some other points are pressed upon our attention; but I think it unnecessary to discuss them at length.

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As no error was committed in the court below, the motion for a new trial must be denied, and the judgment affirmed, with costs.

INGALLS, J., delivered an opinion for affirmance, as follows: The defendants were partners in the freighting business, at Livingston station, Columbia county; commencing October 1, 1860. On the 23d January, 1861, Miller & Gale were indebted to J. N. Hover in the sum of \$156, for hay sold said firm, and said Hover was indebted to Harold C. Gale, one of said partners, in the sum of \$120. Harold C. Gale paid Hover thirty-six dollars, being the difference between the two accounts, and drew a check, of which the following is a copy:

“HUDSON, N. Y., *January* 23, 1861.

“Hudson River Bank. Pay to J. N. Hover, or bearer, one hundred and fifty-six dollars.

“MILLER & GALE.

“\$156.”

The check was not delivered to Hover, but was retained by Harold C. Gale, by whom it was subsequently transferred to the plaintiff, and applied upon a note held by plaintiff against said Harold C. Gale for \$200. Subsequently to the execution of the check, Harold C. Gale sold and transferred his interest in said partnership to the defendant, Miller, and as a part of the arrangement, Miller assumed to pay the partnership debts to the sum of \$2,046.39; but if they exceeded that sum, the excess was to be paid by Miller & Gale in equal proportions. The principal question litigated upon the trial was in regard to the time the check in question was transferred to the plaintiff; whether before or after the dissolution of the partnership of Miller & Gale; and the determination of that question involved the inquiry whether such partnership was actually dissolved on the 22d February or 21st March, 1861. The written agreement between

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Miller & Gale bears date March 21, 1861, but upon the trial it was insisted by the defendant, Miller, that there was an error in the date of such instrument, and that it should have been dated February 22d, 1861, the time when the transaction actually occurred. The evidence upon this question was conflicting, and we must assume that the jury became satisfied that such mistake in the date of the instrument was established. There was still another question litigated upon the trial, which was in regard to the time the plaintiff received said check. The evidence upon this question was also conflicting, and it is evident that there was a severe struggle in relation to both of said questions. From the result we must assume that the jury concluded that the check was transferred to the plaintiff after the dissolution of the partnership; and that at the time the said agreement between Miller & Gale was executed, Harold C. Gale was the owner of said check. We do not deem it necessary to enter upon a particular discussion of the evidence bearing upon the several questions involved in the controversy. The plaintiff cannot, in any view of the case, be regarded a *bona fide* holder of said check, as he neither assumed a liability or parted with anything as a consideration for the transfer to him of the check. (*McBride v. Farmers' Bank*, 26 N. Y., 454; *Stalker v. McDonald*, 6 Hill, 93; *N. Y. Exchange Co. v. De Wolf*, 31 N. Y., 273, 284; *Prentiss v. Graves*, 33 Barb., 621.) Assuming to be true, what the jury must have found, that Harold C. Gale was, at the time the partnership was dissolved, and when Miller assumed the payment of the partnership debts, the owner of said check, we are of opinion that the defendant established a complete defence to the action upon the check. (*National Bank v. Norton*, 1 Hill, 572; *Lusk v. Smith*, 8 Barb., 570; *Mitchell v. Ostrom*, 2 Hill, 520; *Lansing v. Gaine*, 2 John. Rep., 300.) No motion was made to amend the complaint, or to change the form of the action.

As the plaintiff has taken exceptions to the charge of the judge, we must examine, with a view to ascertain whether

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error was committed in that respect prejudicial to the rights of the plaintiff.

The judge charged the jury, in one particular, as follows: "As this case stands, you are bound to consider all the evidence that has been introduced, and not a single part of it is irrelevant." We observe no objection to this direction. Certainly the jury were bound to consider all the evidence, as it was not their province to reject as irrelevant, evidence which the court had taken the responsibility to admit. Any other rule would be likely to work great injustice, as a party might have the benefit of an exception to the decision of the judge, in admitting evidence, and the advantage arising from the rejection thereof by the jury.

The judge properly charged the jury, in substance, that to sustain the plaintiff's cause of action, they must find that the check was issued and passed to the plaintiff before the dissolution of the partnership. The judge further charged the jury as follows: "If plaintiff received the check in the month of March, he received it after the dissolution of the copartnership, and it would not be a valid instrument in his hands, and plaintiff could not, in any view of the law, recover, in any form, in this action." This portion of the charge must be construed in connection with that which preceded it, and the facts proved upon the trial. The court had already, substantially, submitted to the jury, for them to find, whether the check was transferred before the dissolution of the partnership, which embraced the inquiry, whether it was in February or March, 1861. We think it but reasonable, in construing this portion of the charge, to precede it by these words: "If you find that the partnership was dissolved on the 22d February, 1861," which would make the charge read as follows: "If you find that the partnership was dissolved on the 22d February, 1861, and the plaintiff received the check in the month of March, he received it after the dissolution of the copartnership, and it would not be a valid instrument in his hands; and the plaintiff could not, in any view of the law, recover, in any form, in this action." The

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jury could not have been misled by this portion of the charge, applying it to the facts proved, and taking it in connection with the other directions which they received. (*The People v. Bransby*, 32 N. Y., 525.)

It is evident that much of the charge was omitted in making up the case, which creates embarrassment in considering that which is inserted. We are of opinion that the charge was substantially correct, and that the plaintiff has not been prejudiced thereby. No error was committed in allowing evidence in regard to the check book and other papers of the firm, as such inquiry was material in investigating the transaction, to ascertain whether or not the check in question was embraced in settlement. Certainly a reasonable latitude of examination was allowable in investigating the transaction, and in this particular very much must be left to the discretion of the judge who tries the cause; and nothing short of a palpable abuse of such discretion should induce this court to interfere. The inquiry in regard to certain charges of dishonesty and stealing, claimed to have been made by Kniskern against Harold C. Gale, in the presence of the plaintiff, and the evidence of Jacob R. Gale and Kniskern, in relation thereto, were certainly harmless. Jacob R. Gale testifies that he did not hear Kniskern charge his brother with dishonesty, and Kniskern testifies that he did not know what he charged Gale with. It is hardly possible that any injury could have resulted to the plaintiff from this evidence, even though it be conceded that technical error was committed by admitting it, which I am not prepared to assume. In the trial of a cause, which is sharply contested, it not unfrequently happens that evidence is admitted or rejected, whereby some rule of evidence is violated; yet this court does not feel called upon to reverse a judgment, when it affirmatively appears that the party complaining could not have been injured thereby. (*Woodruff v. McGrath*, 32 N. Y., 255.) We are of opinion that no substantial reason appears, calling for the reversal of this judgment, and the same should be affirmed, with costs.

Hogeboom, J., dissented.

Judgment affirmed.

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ELIZA CRUGER v. WILLIAM DOUGHERTY.

(GENERAL TERM, SIXTH DISTRICT, JULY, 1869.)

An assessment for rents reserved in leases in fee (L. 1846, p. 466), must be made in accordance with the requirements of the Revised Statutes, regulating the assessment of personal property.

The plaintiff, in an action of ejectment, proved title as one of the heirs of J. K., deceased, to the premises in dispute, being part of K. patent, in the town of K. The defendant claimed to show title out of the plaintiff, by proving a sale, made under an assessment to the latter, as such owner of an undivided interest in several leases in fee, which covered the premises and other lands in K. respectively. The assessment had been made under a description as follows: "The K. patent: J. K. and others, legal heirs of J. K., late of the city of New York, deceased, or their heirs or assigns for rents reserved in the town of K., in the county of D., &c."—*Held*, the assessment being to a person deceased and others not named, or their heirs or assigns, and each rent not being specified, the same was void, and the defence failed.

Wheeler v. Anthony (10 Wend., 346) distinguished.

A sheriff's notice of the sale of lands under the warrant of a county treasurer, issued upon an assessment of rents reserved, &c., must describe the lands to be sold separately; and where the notice describes such lands as "all that certain piece or parcel of land, situated in the town of K., in said county of D., and known and described as the K. patent, and bounded as follows, &c.," there being several distinct leases of lots, in the patent, upon which the assessment is made, and other lands therein not leased, the notice is insufficient. Per BALCOM, J.

THIS action was brought to recover one undivided sixth part of a certain lot of land, situated in the town of Kortright, in the county of Delaware. It was tried at the Delaware Circuit, in February, 1869, when, by direction of the judge, the jury rendered a verdict in favor of the plaintiff. The defendant moved for a new trial, on exceptions which the judge directed should be heard, in the first instance, at the General Term.

A. J. Parker, for the plaintiff.

F. R. Gilbert, for the defendant.

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Present—BALCOM, BOARDMAN and PARKER, JJ.

By the Court—BALCOM, P. J. The land in dispute in this action is part of lot No. 7, in the Kortright patent, in the town of Kortright and county of Delaware. The foundation of the plaintiff's title is a patent granted by King George the Third to Lawrence Kortright, and others, dated the 24th day of February, 1770.

That the plaintiff showed title to the land in dispute, and a right to recover the one undivided sixth part thereof, when she rested her case, is settled by the decision we made at the November General Term, in the year 1868, in *Cruger v. McClaghry* (51 Barb., 642). That decision has since been affirmed by the Court of Appeals.

The question now presented is, whether the defendant showed title out of the plaintiff under a sale of the land for taxes by the sheriff of Delaware county, on the 28th day of June, 1865. The land was not redeemed, but no conveyance thereof has been made by the sheriff to the purchaser under the sale.

I shall not examine the question whether a conveyance from the sheriff was necessary to pass the title to the purchaser. The view I take of the case renders it unnecessary to express any opinion on that question.

The entry, respecting the assessment of the rents reserved in the lease of the land in dispute, and in leases of other lands in the town of Kortright, in which the plaintiff had an interest, upon the assessment roll of that town, in the year 1864, was as follows, viz.: "The Kortright Patent: John Kortright and others, legal heirs of John Kortright, late of the city of New York, deceased, or their heirs or assigns, for rents reserved in the town of Kortright, in the county of Delaware, subject to taxation, estimated at a principal sum, which, at a legal rate of interest (seven per cent), will produce an income equal in amount to such rents; personal \$26,195."

It was proved that John Kortright died in 1859; and all of his children but two had died prior to the year 1864.

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It is provided by section one of chapter 327 of the Laws of 1846 (Laws of 1846, p. 466), as follows: "It shall be the duty of the assessors of each town and ward, while engaged in ascertaining the taxable property therein, by diligent inquiry, to ascertain the amount of rents reserved *in any leases in fee*, or for one or more lives, or for a term of years exceeding twenty-one years, and chargeable upon lands within such town or ward, which rents shall be assessed *to the person or persons* entitled to receive the same, as personal estate, which it is hereby declared to be for the purpose of taxation under this act, at a principal sum, the interest of which at the legal rate per annum shall produce a sum equal to such annual rents; and in case such rents are payable in any other thing except money, the value of such annual rents in money shall be ascertained by the assessors, and the same shall be assessed in manner aforesaid." It is further provided by chapter 357 of the Laws of 1858 (Laws of 1858, p. 600), that the assessor shall, in all cases of assessments under chapter 327 of the Laws of 1846, specify in the assessment roll *each rent* so assessed, &c.

It was held in *Livingston v. Hollenbeck* (4 Barb., 9), that the Law of 1846, to which I have referred, did not repeal previously existing laws regulating the assessment and collection of taxes, but merely added a new subject for taxation. The amendment of that law by chapter 357 of the Laws of 1858 (*supra*), did not affect the rule laid down in *Livingston v. Hollenbeck*.

According to the Revised Statutes, the first column of the assessment roll must contain "the names" of all the taxable inhabitants in the town or ward, as the case may be, and the fourth column of the roll must contain "the full value of all the taxable personal property, owned by such person after deducting the just debts owing by him." (1 R. S., 5th ed., p. 909, § 9.)

The proof showed that the plaintiff was one of the children and heirs of John Kortright, deceased; that the land in question was leased by him, by a lease in fee, to one David

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McIlwain in 1789; and that John Kortright, deceased, about that time and subsequently, gave leases in fee to different persons, of other lots of land, in the town of Kortright. A rent was reserved in each lease. The plaintiff's interest in the leases and right of re-entry under them, was one undivided sixth part.

No such person as John Kortright had any interest in the land in dispute, or in any of the leases, when the assessment was made in 1864, and I am of the opinion "the person or persons," to whom the rents were assessed in that year, were not sufficiently named; and that such assessment cannot be upheld by the application of the very liberal rule adopted in *Wheeler v. Anthony* (10 Wend., 346), or that laid down in *Van Voorhies v. Budd* (39 Barb., 479).

The rents were assessed in the aggregate. Each rent was not specified in the assessment roll, as required by the law of 1858. (Laws of 1858, p. 600.)

The warrant issued by the treasurer of Delaware county to the sheriff of that county, by virtue of which the land in dispute was sold by such sheriff to D. McIlwain, for nine dollars, commanded the sheriff "that of the goods, chattels, and real estate of the said John Kortright, and others, legal heirs, as aforesaid, he make the sum of \$632.41," &c.

The notice the sheriff gave and published of the sale of the lands in Kortright, described the same as: "All that certain piece or parcel of land, situated in the town of Kortright, in said county of Delaware, and known and described as the Kortright patent, and bounded as follows: On the south, by Brant's, or Little's patent; on the east, by the town line of Harpersfield; on the north, by the town line of Davenport; and on the west by the Banyer patent."

A large portion of such lands were free of all leases and rents. Those held under leases in fee, were separate lots, situated in different parts of the town of Kortright; but embracing, probably, over half of the land in that town.

The notice of sale should have described the lots to be sold. When a county treasurer issues his warrant for the collection

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of taxes assessed "upon the person or persons" entitled to receive rents reserved in any leases in fee (Laws of 1846, p. 467, § 2), the sheriff, to whom such warrant shall be directed, "shall proceed upon the same, in all respects, with the like effect, and in the same manner as prescribed by law in respect to executions against property, issued by a county clerk, upon judgments rendered by a justice of the peace." (Laws of 1846, p. 467, § 5.)

Advertising for sale, by a sheriff, of all the lands in a town, or described in a patent, when he is authorized to sell only certain lots in such town, or only parcels of the land described in the patent, is not the way lands should be advertised for sale by virtue of executions. (See *Mason v. White*, 11 Barb, 173 and 184.)

But I will not pursue this question further, for the reason that I hold the assessment made in 1864, of the rents reserved in the leases in fee, chargeable upon lands in the town of Kortright, was void; because the assessment was to a dead person, and others not named, *or* their heirs *or* assigns; and *each rent* assessed was not specified in the assessment roll. I think it very clear that an assessment, in the alternative, to A, *or* B, *or* C, is not valid as against either; and that I need not discuss the question whether an assessment, in the alternative, to a dead man and others, as a class, without naming them, "or their heirs or assigns," is valid against either.

In *Wheeler v. Anthony* (*supra*) the assessment of a farm was to "the widow *and* heirs of Zopher S. Wheeler, deceased." There is a plain difference between such an assessment and one to the widow *or* heirs of a deceased person, *or* their assigns. The former is certain, and the latter uncertain, as to the persons to whom the assessment is made.

If the foregoing views are correct, no defence to the action was established; and the defendant's motion for a new trial should be denied, with costs.

So decided.

White v. Smith.

WILLIAM E. WHITE and WILLIAM R. WHITE, Appellants, v.
JANE SMITH, Respondent.

(GENERAL TERM, SIXTH DISTRICT, JULY, 1869.)

On a trial before a referee, the plaintiffs obtained an adjournment for the purpose, moved the court, had leave to serve, and served a reply to the defendant's counter-claim. It seems, a new hearing afterward, before the referee, was an adjournment of the former hearing, and the issues not being essentially changed by the reply, the referee might, in his discretion, refuse to allow a re-examination of witnesses *de novo*.

The complaint averred an amount earned for services, &c., contained no allegation as to any distinct payments, but claimed a balance due thereon, after deducting payments made; the answer denied each and every allegation, &c., and set up a counter-claim. On the trial defendant proved the counter-claim, but no payments were proved or admitted, except as admitted by the complaint; the referee regarded the difference between the balance claimed by the complaint, and the sum therein stated as originally due, as representing payments made, and found that the defendant was entitled to be allowed the amount of such difference, together with the amount of his counter-claim; he found, however, that a less amount was originally earned, or due, than the complaint stated in that respect, and deducting such lesser amount from the sum of the counter-claim and payments, gave defendant the balance.—*Held*, the referee erred in deducting the payments from a smaller sum than plaintiffs stated as originally due, and a new trial was granted. The order of reference was allowed to stand, with leave to move for a new referee.

APPEAL by plaintiffs from a judgment entered upon a report of a referee, in the office of the clerk of Schuyler county, on the 17th day of August, 1867, in favor of the defendant, for \$96.39 damages, besides costs.

John J. Van Allen, for the appellants.

George Smith, for the respondent.

Present—BALOOM, PARKER and BOARDMAN, JJ.

By the Court—BALOOM, P. J. The plaintiffs alleged in their complaint, that between the 13th day of June and the 15th

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day of August, 1866, they, by themselves and their servants, performed work and labor as carpenters and joiners, and furnished material for the erection of a building in the village of Watkins, at the request of the defendant, and with her knowledge and approbation, to the amount of \$541.90, as by the bill of items therefor, annexed to the complaint, would more fully appear; that the work and labor so performed for the defendant, and the material so furnished, were reasonably worth the price charged therefor in said bill of particulars; that there was a *balance* due from the defendant to the plaintiffs for such work, labor and material, as aforesaid, *after deducting all payments* made by the defendant to the plaintiffs thereon, of \$175.75. And the plaintiffs demanded judgment against the defendant for the said sum of \$175.75, with interest thereon from the 15th day of August, 1866, besides costs.

The answer of the defendant was a denial of each and every allegation, matter and fact set forth in the complaint. Second. A counter-claim, to the effect that the plaintiffs performed the work and labor, and furnished the material mentioned in the complaint under a contract which required them to do the work for the defendant in a good, workmanlike manner; which they did not do. And the defendant claimed damages for the non-performance of such contract by the plaintiffs, to the amount of \$500.

No payment was set up in the answer or credited to the defendant on the plaintiff's bill of items annexed to the complaint; and none was proved or admitted on the trial, nor was any portion of the complaint read as evidence before the referee.

The trial was commenced before the referee on the 18th day of April, 1867, when several witnesses were sworn and examined on the part of the plaintiffs, and on the cross-examination of the witness, Nathan Coleman, the defendant proved her alleged counter-claim, to the extent of \$231.50, as found by the referee.

After a recess was had on the 18th day of April, 1867, the plaintiffs' counsel moved for an adjournment or postponement

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of the *further* trial of the action to enable the plaintiffs' attorney to make a motion to the Supreme Court for leave to serve a proper reply to the defendant's answer setting up a counter-claim; which motion was granted by the referee, on payment of the costs of a circuit, the trial fee before the referee, referee's fees and defendant's witness fees; to which the defendant objected. The referee adjourned the cause until the 20th day of June, 1867.

On the 18th day of June, 1867, this court, at a Special Term thereof, granted leave to the plaintiffs to serve a reply to the defendant's answer setting up a counter-claim, but such leave was granted on payment of ten dollars, costs of opposing the motion therefor. A reply was served on the 19th day of June, 1867.

As the referee was about to proceed with the trial, on the 20th day of June, 1867, counsel for the plaintiffs proposed to open the cause, and begin the trial anew, on the part of the plaintiffs, to which the defendant's attorney objected, and insisted that the plaintiffs should commence with the trial of the action where they left off, at the time the further trial was postponed on their motion. The referee held and decided that the plaintiffs must commence with the trial where they left off; but should have the liberty to examine any witness they had already examined upon any new matter relating to the issues, upon which he had been sworn, or upon any matters omitted by inadvertence on his former examination, to which ruling and decision of the referee the plaintiffs' counsel excepted.

George R. White was sworn and examined as a witness for the plaintiffs, on the 18th day of April, 1867; he was recalled by the plaintiffs on the 20th day of June, 1867, when they desired to examine him generally, without any regard to the evidence given by him on the 18th day of April. The referee ruled that the witness might be examined as to any matter to which he had not already been examined, or to any such matter as he had testified to, where his recollection had been refreshed, and he desired to correct his testimony, to which ruling the plaintiffs' counsel excepted.

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The defendant did not dispute upon the trial, but conceded that the number of days' work were performed, and that the amount and value of the lumber embraced in the plaintiffs' bill of items, annexed to the complaint, were correct.

The referee found, among other facts, that the labor of the plaintiffs' hands, at the price agreed on, together with the lumber and material furnished by them, amounted to the sum of \$501.26.

The referee also found that before the commencement of the action the defendant paid the plaintiffs, upon their demand, the sum of \$366.15. That the items of the defendant's counter-claim amounted to \$231.50, and he directed judgment in favor of the defendant for the difference between the aggregate of the last mentioned two sums and the said \$501.26 of \$96.39, for which last mentioned amount judgment was rendered and entered against the plaintiffs with costs.

The plaintiffs filed and served exceptions to the findings of the referee.

The order that the referee made on the 18th day of April, was an adjournment until the 20th day of June; and it was made on the motion of the plaintiffs for an adjournment or postponement of the *further* trial of the action, so that they could make a motion for leave to serve a proper reply to the defence of a counter-claim. And I am of the opinion the issues in the action were not so entirely changed by the service of the reply as to render it necessary to examine any of the witnesses *de novo* on the 20th day of June, who were sworn and examined on the 18th day of April. It therefore was in the discretion of the referee to restrict the plaintiffs on the 20th day of June, in the same way and to the same extent, he might if the reply had been served before the trial was commenced on the 18th day of April. If I am right in this conclusion the referee did not err in holding that the proceedings, on the 20th day of June, were a continuation of a trial or a further trial that was commenced on the 18th day of April.

The referee could properly have found that the defendant

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paid the plaintiffs \$366.15 on their claim of \$541.90, prior to the commencement of the action. The just inference from the complaint, is that the plaintiffs had been paid that sum on such claim, by the defendant. The amount of the plaintiffs' claim, stated in the complaint, was \$541.90, which is followed by the allegations, that there was a *balance* due from the defendant to the plaintiffs, *on such claim*, after deducting all *payments* made by the defendant to the plaintiffs, of \$175.75; for which balance only judgment was demanded in the complaint, besides interest and costs. The difference between such *balance* and the amount of the plaintiffs' claim, as alleged in the complaint, was \$366.15, which the referee found the defendant had paid the plaintiffs.

It is provided by § 168 of the Code, that the material allegations in the complaint, which are to be taken as true, are those not controverted by the answer. This makes the defendant admit the material allegations of the complaint to be true, which he omits to deny. But it does not authorize the plaintiffs to except to, or complain of a holding, that any material allegation of his complaint is true which is denied, though no evidence be given to establish it by either party, unless the holding wrests such allegation from its true meaning.

I think the referee had the right to assume that the defendant paid the plaintiffs \$366.15, upon the plaintiffs' claim of \$541.90; but he found the plaintiffs' claim was only \$501.26, and then held that \$366.15 was paid upon it, without any evidence or admission, except what was inferable from the complaint. I am of the opinion, this holding wrested the allegations of the complaint, respecting payments upon the plaintiffs' claim, from their true meaning, and that it was erroneous.

It seems to me the defendant should have alleged payment in his answer, of \$366.15, and proved it; or that he should have conceded on the trial that the plaintiffs' entire claim was \$541.90, as stated in the complaint, to enable him to insist that the complaint showed he had paid the plaintiffs \$366.15.

The plaintiffs' counsel insists that the referee erred in allow-

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ing the defendant a counter-claim, and especially in allowing her the value of certain iron rods ; but, I think, we need not pass upon those questions, for the reason that the referee erred, as we have seen, in his finding upon the question of payment.

My conclusion is that the judgment in the action should be reversed, and a new trial granted, costs to abide the event. The order of reference should stand, but either party should have leave to apply for the appointment of a new referee.

Ordered accordingly.

JOHN W. SHUMWAY and JOSEPH HUNT, executors, &c., v.
ISAAC G. SHUMWAY.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

The power of this court to grant new trials under § 37, 2 R. S., 309, is confined to actions of the same character as the former action of ejectment.

APPEAL from an order at Special Term.

The action was brought to set aside a deed executed by the plaintiffs' testator, in his lifetime, and delivered to the defendant, on the ground that the same was procured by the defendant by fraud, and undue influence.

The plaintiffs obtained judgment that the deed was void, as prayed for in the complaint. The defendant moved at Special Term to have the judgment vacated and a new trial granted, as matter of right, as in an action of ejectment under the Revised Statutes. The motion was denied, and the defendant appealed to the General Term.

Geo. F. Danforth, for the defendant.

E. G. Lapham, for the plaintiffs.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

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By the Court—JOHNSON, J. This court has no power to set aside a judgment arbitrarily, and grant a new trial in a case where no error has been committed, and no review is had, except in cases where such authority is conferred by statute.

This power is given in actions of ejectment only. (2 R. S., 309, § 37.) It is held that this power may still be exercised by this court, in actions of the same nature, brought since the adoption of the Code.

Strictly, the action of ejectment has now no existence. But the same kind of action is now prosecuted under the name of an "action for the recovery of real property, or for the recovery of the possession thereof."

In actions of this character, this court may still set aside a judgment and grant a new trial, without any review, or allegation of error, at the instance of the party against whom a judgment has been rendered, if the application is properly made within the prescribed time. The defeated party is entitled to the order, in such cases, as matter of right. But the right of the party, and the power of the court is confined to cases of that character. And while the Code has not abolished either the right or the power in that class of cases, it certainly has not extended it to other cases, in regard to which it did not exist, under the Revised Statutes.

The action here was not an action of ejectment, or in the nature of such an action. The action in this case, was brought by the executors of Isaac Shumway, deceased, to set aside a deed, which as they alleged, had been obtained by fraud and undue influence by the defendant, from the testator.

The testator, by his will, had ordered his real estate to be sold and converted into money, and given the power to sell and convey the same to his executors. The object of the action was to have the deed declared void, so that the power of sale, under the will, might be exercised by the plaintiffs, for the benefit of the estate.

It is in no respect of kin to the old action of ejectment. It is an action which was very familiar to the profession and to the courts, long before the Code, and at the time the Code

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was adopted, no court had any power to set aside a judgment or decree rendered in it, upon the mere request of a party. As before remarked, the Code has not had the effect to extend this power to actions, other than those in the nature of the former action of ejectment. The order appealed from, was therefore right, and must be affirmed with costs of appeal.

Order affirmed.

SMITH H. NEWMAN v. THE BOARD OF SUPERVISORS OF LIVINGSTON COUNTY.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

The plaintiff having been compelled, by levy and sale of his property, to pay the unpaid tax, of a former occupant of his premises, with which he had been charged upon the annual assessment rolls, by the board of supervisors, as a returned tax, and for which he was not liable, sued the county to recover the amount so paid.—*Held*, the complaint stated no cause of action. A demurrer will not be sustained to an answer, when the complaint states no cause of action, and although such demurrer is not made, to all the defences stated in the answer.

Nor can a motion to strike out an answer to such complaint, as sham, &c., be granted.

THIS action was brought to recover an amount assessed by the board of supervisors of Livingston county, to the plaintiff, in the year 1867.

The complaint alleged that in the year 1866, one James Forbes was the owner and occupant of certain premises, in the village of Lima, in the county of Livingston, and was in that year assessed a tax thereon of \$141.31.

That before the assessment roll, and warrant for that year, were delivered to the collector, Forbes had removed to Yates county, and the plaintiff had become the owner and occupant, and was in the actual occupancy of the premises, during all the time, the assessment roll and warrant were in the collector's hands, and until April, 1867, when the collector returned the tax unpaid, and "that he had not, upon diligent inquiry,

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been able to discover any goods or chattels belonging to or in the possession of the person charged with or liable to pay such sum whereon he could levy the same."

That in 1867, the board of supervisors, at their annual session, assessed to the plaintiff the returned tax of 1866, which, with the interest and fees thereon, amounting to \$144.84, was carried with the plaintiff's tax on said premises for the year 1867 into the fifth or last column of the assessment roll of the town of Lima, for the year 1867, as follows:

| Names of own's or possessors. | Remarks. | Value of real estate. | Total real and personal est. | Tax to be paid thereon |
|----------------------------------|----------------------------------|--------------------------|---------------------------------|---------------------------|
| Newman Smith. | Public House. Ret. tax \$144.84. | \$5,000 | \$5,000 | \$257.67 |

and delivered the same with their warrant annexed to the collector.

That the plaintiff paid the tax on said premises for the year 1867, and the collector, by levy and sale of the plaintiff's personal property, made the amount of the returned tax and fees for collection, amounting to \$152.08, and paid the same, less his fees, to the county treasurer. That the said assessment was illegal and void, &c., &c.

The answer set forth three separate defences, viz.:

1. That the signing of the warrant was not the corporate act of the county of Livingston, but that such warrant was signed by the supervisors of the several towns, as by law required.

2. That defendant had no knowledge or information as to the facts stated in the complaint, in regard to the tax, levy and sale, and denying that the assessment of the tax was illegal and void or imposed without authority of law.

3. That no demand had been made upon said defendant or the board of supervisors of the county of Livingston, for the payment of the money so collected by said collector, before commencement of the action.

To the last of the defences the plaintiff demurred, and he moved to have the others stricken out as sham, &c.

The court granted the motion as to the first defence, denied it as to the second, and sustained the demurrer, and defend-

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ants appealed from that part of the order sustaining the demurrer and striking out the first defence, and plaintiff from that part of the order refusing to strike out.

E. A. Nash, for the plaintiff.

S. Lord, for the defendant.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. This is an action brought against the county of Livingston to recover certain moneys collected by the town collector of the town of Lima, in which the plaintiff resided, and paid over to the county treasurer of such county. The amount claimed is part only of the general tax, levied against the plaintiff for the year 1867, and collected and paid over as aforesaid. This amount it is alleged, was illegally, and without warrant or authority of law, added to the amount lawfully assessed against the plaintiff, and placed in the tax column of the assessment roll by the board of supervisors of said county. Taking all that is alleged in the complaint to be true, it is clear, I think, that the action to recover back that money cannot be maintained since the decision of the Court of Appeals in *Swift v. The City of Poughkeepsie* (37 N. Y. R., 511). BACON, J., in delivering the opinion of the court in that case, says: "No suit to recover taxes erroneously assessed and paid over to a county, or municipal corporation, has yet been sustained in this State, whatever may be the rule elsewhere." The action in that case was, like the action here, to recover back money alleged to have been wrongfully assessed and collected, after it had been paid over to the treasurer. The decision in that case is put upon the broad ground that no such action will lie. It is said in the opinion, which was concurred in unanimously, that "nothing is better settled, than that no action will lie to recover back money collected by virtue of legal proceedings, unless such proceedings can be impeached, as founded on fraud, imposition, or extortion." And again, "a

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party cannot proceed a single step, in such an action if, in order to sustain it, the court is called upon to review the merits, or the regularity of the proceedings, or determination, as the result of which the money was collected and paid over." These principles clearly cover this action. It is said by the plaintiff's counsel, that the case referred to, was the case of an illegal assessment, by the assessors, who had jurisdiction generally to make assessments, and is not like the case at bar. But the cases are not distinguishable in their cardinal features, which determine the right of action. There, the assessors had assessed property not liable to be assessed for the purposes of taxation. Here the board of supervisors have estimated, and set down in the tax column of the assessment roll, a greater sum than was proper, or added an item to the tax which they were not authorized to add. All that can be said of it is, that in doing this, they committed an error, which upon review in a proper manner, might have been corrected. It is made the duty of the board to examine all the assessment rolls, and they are authorized to increase or diminish the aggregate valuations of real estate in any town, or ward, in such a manner as to produce a just relation between all the valuations in the county (1 R. S., 395, § 31.) They are also required to estimate and set down in a fifth column in the assessment roll, opposite to the several sums set down as the valuations of real and personal estate, the respective sums in dollars and cents to be paid as a tax thereon. (Id., § 33.) This perfects and completes the judgment, so to speak, upon which the warrant is issued to the several collectors; and, conceding that the item complained of was erroneously estimated, and set down in the tax column as part and parcel of the sum to be paid as a tax by the plaintiff, it does not lay the foundation for an action of this character. It is an error or irregularity which the court will not review in an action like this. The board of supervisors clearly had jurisdiction to estimate and set down in the tax column the sum to be paid as a tax by the plaintiff; and even if they erred in adding an improper item

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as part of the sum, this is not the proper mode of redress. So much, I think, must be regarded as settled by the decision above referred to. It is proper to consider this question here, because, if I am right, it is available to the defendant on the plaintiff's demurrer to the third answer. It is a well settled principle, that upon the hearing and determination of a demurrer to any pleading, the court will give judgment against the party who has committed the first error in pleading. No court should ever sustain a demurrer to an answer put in to a complaint which clearly contains no cause of action. To do so would have the effect to continue and protract abortive and fruitless litigation, and violate long established rules in such cases. The learned judge at Special Term sustained the demurrer on the ground that it was not to the whole defence set up in all the answers. It was conceded by him that if it had been, judgment ought to be given for the defendant, for the reason that no cause of action was alleged in the complaint. But I do not understand that the rule was ever so limited. If the complaint contains no cause of action, the court will not stop to consider whether any one of several answers is proper or not. There is nothing to be considered in such a case, as to the sufficiency of the answer. There is nothing to be answered, and one answer is as good as another. I am of the opinion, therefore, that the demurrer should have been overruled. For the same reason the motion to strike out the first answer, as irrelevant and frivolous, should have been denied, as the motion to strike out the second answer was, as not being sham, frivolous or irrelevant. Nothing of the kind can possibly be predicated of an answer to a complaint which contains no cause of action whatever. This must be obvious to every legal mind, and needs no comment to render it evident. I am of the opinion, therefore, that the order refusing to strike out the second answer should be affirmed, and that the order striking out the first answer should be reversed. The order sustaining the demurrer should also be reversed, and judgment ordered for the defendant.

Ordered accordingly.

Bridger v. Pierson.

JAMES BRIDGER, Respondent, v. HENRY R. PIERSON, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

THE defendant conveyed land to the plaintiff, with warranty, "reserving always a right of way, as now used, on the west side, &c., from the public highway to the piece of land now owned by R.," &c., and afterward quit-claimed to plaintiff his interest in said land; whereupon, plaintiff obstructed the way reserved. R. had a prescriptive title to the same right of way, and sued the plaintiff, and obtained judgment for damages on account of the obstruction, and for repossession, and was put into possession under the judgment; the plaintiff then brought an action, on the warranty, against the defendant, who, though duly notified, had neglected to defend the suit by R., for the costs and damages recovered in such suit.—*Held*, the covenant of warranty in defendant's deed covered the prescriptive right of R., and the possession of R. enforced under the judgment, was an ouster of plaintiff, and he was entitled to recover.

The right of way was reserved, and not excepted by the deed, and could be construed as having been made for the grantor's benefit only.

THIS action was brought, to recover costs and damages, collected on a judgment against the plaintiff, recovered in an action for obstructing the right of way, of one Reeves, over plaintiff's premises.

The action was referred, and judgment rendered on the referee's report in favor of plaintiff, from which defendant appealed.

It was shown, that the plaintiff had purchased from the defendant, the premises over which the way ran, and received from the latter a deed with the usual covenant of warranty, and also containing the following clause: "Reserving always a right of way, as now used, on the west side of the above described premises, for cattle and carriages, from the public highway to the piece of land now owned by Samuel B. Reeves, lying north, and adjoining the premises herein conveyed." After this conveyance, the defendant executed to the plaintiff, for a consideration of five dollars, a quitclaim deed of the same premises; the plaintiff then closed or obstructed the way, and was thereupon sued by Reeves, who

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claimed a prescriptive right to use the way ; Reeves recovered judgment, establishing his right, and for damages and possession, and obtained possession under the judgment.

The plaintiff, at the commencement of the action against him by Reeves, notified the defendant thereof, and requested him to defend the same, and the defendant neglecting to do so, incurred expenses in defending the action, and brought this suit, as stated above.

L. M. Morton, for the appellant, presented the following, with other grounds for reversal :

The language of the exception or reservation is clear and unambiguous. It was a reserve of the way as "*now used*" to go on to Reeves' land.

Had Reeves undertaken to establish a right of way, over these premises, through or by virtue of the reservation or exception in the deed from Pierson to Bridger, there can be no question, but as to him, this exception or reservation would be void, as he is a stranger to it ; and this is what the authorities hold which were cited by plaintiff's counsel on the trial. (See *Hornbeck v. Westbrook*, 9 John., 73 ; *Ives v. Van Aiken*, 34 Barb., 567.)

But Reeves had a right of way, over the land embraced in the reservation in Pierson's deed. And all Pierson did in his conveyance to Bridger was to use apt language to protect himself and limit his covenant for quiet enjoyment, so that the paramount rights of Reeves should not be construed as a breach of it. And this, we say, he has accomplished.

S. K. Williams, for the respondent.

Present, E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. Upon the facts found by the referee, the conclusions of law are unquestionably correct. The deed from the defendant to the plaintiff is deemed, in law, to have conveyed the entire and exclusive title to the premises therein described, with all the rights incident to a

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perfect and exclusive ownership, except such rights as were reserved by the terms of the instrument. The reservation is of a right of way only, as the same was then used. This was a reservation to the grantor only, and not to any stranger or third person whatever. No other person could claim or have any right to the premises conveyed, or to anything growing out of the same by reason of this reservation. This is the settled rule of construction in regard to reservations in conveyances, and has been from time immemorial. (1 Prest. Shep. Touch., 78; Whitlock's case, 8 Co., 69, *b*; *Hornbeck v. Westbrook*, 9 Johns., 73; *Ives v. Van Auken*, 34 Barb., 566.) A reservation is always of something issuing or coming out of the thing granted, and not a part of the thing itself. So that the entire and absolute estate was granted by the conveyance in question, with the reservation of the right of way over a particular part, to the grantor only. The covenant in the deed assures to the grantee the quiet and peaceable possession and enjoyment of the entire premises without exception or reservation, save that to the grantor, against any and all other persons lawfully claiming such premises or any right therein. The subsequent quit-claim deed from the defendant to the plaintiff must be held, undoubtedly, to have extinguished the right of way reserved by the first grant, or to have vested it in the plaintiff, which is the same thing. But this is of no moment in this case, as neither the reservation in the first grant, nor the quit-claim, affected at all the rights of Reeves, who claimed a right prior to the plaintiff's title, under his deed from the defendant. This right, it appears, Reeves established in an action as one existing in him, prior and superior to the plaintiff's, and the plaintiff's right and title were, by the judgment of the court, made subservient to that of Reeves; and Reeves has been put into possession and the enjoyment of his right of way over the plaintiff's lands. This is unquestionably an ouster, so far as this right is concerned; and it is equally certain that it was embraced in the covenant in the defendant's grant to the plaintiff. It was against any prior and paramount right in another, that the grantor under-

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took to warrant and defend. It is claimed, on the part of the appellant, that the covenant should not be construed so as to embrace this right which Reeves had before the plaintiff's grant, for the reason that it is evident that this was the right which the defendant intended to except and reserve from the grant. But the parties must be held to have intended just that, which is the legal effect of the instrument. This is clearly a reservation, and not an exception. There are cases, where, though the word "reservation" only is used, the courts will hold it to be an exception; as where the reservation is of a distinct and severable part of the thing granted, as in the case of *Borst v. Empie* (1 Seld. 33). But here the reservation is not of the thing granted, but only of something pertaining to the thing granted, or issuing out of it. This is the distinction between an exception and a reservation. And a reservation, as matter of law, being only to the grantor himself, it follows that the covenant here, covered all other outstanding rights. The defendant had notice to defend the action brought by Reeves, and failed to do so. He is, therefore, bound by that judgment, and this action was well brought.

The judgment must, therefore, be affirmed.

Judgment affirmed.

JOHN P. CADY, Appellant, v. JOHN McDOWELL, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

Plaintiff, who was a housekeeper, but not accustomed to take persons to board, upon the defendant's application, received the latter and his family, into his house, for an indefinite time, with a general understanding that he (plaintiff) was to be compensated for board and accommodations. *Held*, plaintiff was not a boarding-housekeeper within the meaning of the Laws of 1860 (chap. 446, p. 771), allowing a detention of the baggage and effects of boarders, for board due.

The legal meaning of the term boarding-housekeeper explained. Per JOHNSON, J.

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APPEAL from a judgment upon the verdict of a jury. The plaintiff proved upon the trial the facts, as stated in the opinion, and the court directed a verdict for the plaintiff, to which the defendant duly excepted, &c., &c.

W. E. Hughitt, for the appellant.

Davie & Payne, for the respondent.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. The only question in this case, is, whether the defendant at the time the alleged cause of action arose, was the keeper of a boarding-house, within the meaning and intention of the act of the legislature of April 16, 1860. (4 Stat. at large, 680.) If he was such, he was authorized by that act to detain the property and effects in question, for the amount due him for the plaintiff's board. There is no dispute about the facts. The defendant was at the time the keeper of a grocery, and was also a housekeeper. The plaintiff was the brother of the defendant's wife, and had four children. He requested the defendant, to let him come to his house with his children, and live for a time, until he could arrange his affairs, which request was granted; and he went there and lived there with his children about five or six months. No arrangement was made in regard to the time the plaintiff was to remain or as to the price for the board, though it appears, that it was understood between the parties that compensation was to be made. The defendant at the time the plaintiff came there, had kept house only a few months, and had never at any time before or since taken or had any other boarder. Upon this state of facts, the question is fairly presented whether the defendant is within the purview of the statute. The act is entitled "an act for the protection of boarding-housekeepers." Who is a boarding-housekeeper, within the meaning and intention of this act? Is it every housekeeper who in a single instance takes an individual to board for a limited time, by way of accommodation, though for compensa-

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tion, or who occasionally takes one or more persons in that way and in no other, but who does not make it his regular business or calling; or is it a person who belongs to a well understood class of persons, which makes the keeping of boarders a business or calling, in whole or in part? I am clearly of the opinion, that it is the latter class only, that the statute was designed to protect, or that comes within its terms and meaning. A boarding-house is not in common parlance, or in legal meaning, every private house where one or more boarders are kept occasionally only, and upon special considerations. But it is a *quasi* public house, where boarders are generally and habitually kept, and which is held out and known, as a place of entertainment of that kind. I do not find that this precise question has ever before arisen, so as to require judicial determination. But upon a question quite analogous, it has been held, that a person who does not hold himself out as an innkeeper, but who entertains travelers occasionally for pay, is not an innkeeper, nor liable as such. (*Lyon v. Smith* 1 Morris, 184.) It is, I apprehend, within the observation, if not the experience of almost every one, that persons frequently board with friends, and relatives, and even strangers, who are not supposed or understood to keep boarding-houses. It is only the keepers of boarding-houses as such, that come within this statute. The distinction between an inn and a boarding-house has been held to be, that in a boarding-house, the guest is under an express contract, at a certain rate, for a certain period of time, while at an inn the guest being on his way, is entertained from day to day, according to his business, upon an implied contract. The innkeeper is bound to receive every one who applies, if in a fit condition to be received, while the boarding-housekeeper is not bound to receive any one, except upon special contract. (*Willard v. Reinhardt*, 2 E. D. Smith, 148; 2 Kent's Com., 595; *Thompson v. Lacy*, 3 Barn. & Ald., 283; *Holder v. Soulby*, 8 J. Scott, N. S., 254; *Dansey v. Richardson*, 3 Ell. & Bla., 144.)

A boarding-house is as well known, and as distinguishable

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from other houses, in every city and village in the country, as an inn or a tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out, by the owner or keeper, as a place where boarders are kept. That this is the legislative idea, appears plainly by the act of the legislature, passed April 23, 1867. (Chap. 677, Sess. Laws of 1867.) This act is entitled: "An act to prevent fraud and fraudulent practices upon, or by hotel-keepers and inn-keepers." By § 2 of this act, "every keeper of a hotel, restaurant, boarding-house, or inn," is required to post "in a public and conspicuous place, in the office or public room, and in every bed-room, in said house, a printed copy of this act, and a statement of the charge or rate of charges, by the day, and for meals or items furnished, and for lodging." This section also provides that for any violation of the section, or of any provision thereof, the offender shall forfeit to the injured party three times the amount charged, and shall not be entitled to receive any compensation for the entertainment furnished. This shows plainly, as I think, the kind of house the legislature had in view. It was a sort of public house, partaking in some degree of the character of an inn, or restaurant, but differing from either; where the business of entertaining persons for certain periods, and at fixed or agreed prices, was carried on. Certainly, the legislature could not have intended that every private housekeeper, who might occasionally keep one or more boarders, but who did not make it a business, should post up copies of this act, in the different rooms of his house, and be subjected to the penalties prescribed, in case of his neglect to do so. What was decided in *Jones v. Morill* (42 Barb., 623,) cited by the defendant's counsel, was, that the act of 1860 gave to boarding-housekeepers, the same rights which the keepers of inns and taverns had, in respect to their guests, at common law. This was clearly right. The defendant here was a grocer, and, in no legal sense, a boarding-housekeeper. He was a mere private housekeeper, entertaining a boarder, who was a relative, for hire, in a single instance, and does not fall within the letter or spirit of the

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act. Consequently he had no right to detain the goods, and the action was well brought, and should have been sustained. A new trial must, therefore, be granted, with costs to abide the event.

New trial granted.

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EDWARD MYNDERSE v. JAMES SNOOK and JOB S. STEVENS.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

To a complaint by the payee, on a negotiable promissory note, the defendants answered a non-joinder of parties plaintiff, and in order to establish the defence, proved that the note was made and delivered to the plaintiff, a member of a partnership firm, with the firm's consent, for moneys loaned from firm funds, and in furtherance of its contract.—*Held*, plaintiff was entitled to maintain the action, and the defence was not sustained.

Held, also, that defendant could not set up a counter-claim for damages, existing in his favor, against the firm, and arising out of the contract, with reference to which, the loan for which the note was given, was made.

The suggestion to the contrary in *Schubart v. Harteau* (34 Barb., 447), held to be *obiter*, and *Briggs v. Briggs* (20 Barb., 477), upon which the same is based, commented upon, and the latter case, and *Parsons v. Nash* (8 How. Pr. R., 454), explained.

MOTION by defendant for a new trial on a case with exceptions.

The complaint was upon a promissory note for \$1,000, made by the defendant and payable to the plaintiff or order.

The answer averred, that the plaintiff, and one Vancief, were partners in the distillery business, under the firm name of Mynderse & Co.; that the note belonged to the firm, and that Vancief should have been joined as party plaintiff in the action.

That the firm, had entered into a contract in writing with defendants, by which it agreed to feed a certain number of hogs, at a price, and for a time named; and also, to loan the defendants the sum of \$1,000, for the purchase of the hogs, upon their note, payable at the expiration of the time during

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which the firm was to feed the hogs, and that the note was to be a lien on the hogs until paid ; and in pursuance of the agreement, that Mynderse & Co. loaned the money for which the note was given.

The answer also averred performance by the defendants, a breach of the agreement on the part of Mynderse & Co., and claimed damages on account of such breach, to the amount of \$4,000.

It also averred that the loaning of the money in pursuance of the agreement, and the acceptance of the note by the plaintiff, were on behalf of Mynderse & Co., and that the action was brought on behalf of the firm of Mynderse & Co., and it claimed damages arising out of the alleged breach of contract, and set the same up as a counter-claim.

The plaintiff replied by a general denial of the counter-claim.

At the trial, the making and delivery of the note were admitted ; the defendants proved the contract set forth in the answer, that it was in plaintiff's handwriting, and signed "Mynderse & Co." by him, delivered to the defendants, and a copy retained by the firm ; that the note was drawn by plaintiff ; that they (defendants) received the amount of the note, as follows : Six hundred dollars in cash, and the balance by check of Mynderse & Co., paid from the funds of said firm on deposit in the bank upon which it was drawn ; and they also proved performance of their part of the contract. The defendant's counsel then announced, that he did not expect to vary the evidence already given, with respect to a non-joinder of plaintiffs, and the court ruled and decided that the evidence given did not tend to sustain that defence, and to this ruling the defendants excepted. The defendants then offered to prove the breach of contract and counter-claim, set up in their answer. To this evidence the defendants objected, the objection was sustained and defendants excepted.

The court directed the jury to find a verdict for the plaintiff for the amount of the note and interest, which they did ;

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defendants obtained a stay of proceedings, and moved as stated, for a new trial.

W. F. Cogswell, for the plaintiff.

D. J. Sunderlin, for the defendant.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

By the Court—JOHNSON, J. The justice at the circuit was clearly right in holding that there was no evidence tending to sustain the defence of non-joinder of proper parties set up in the first answer. The note was plain, and, upon its face, was payable to the plaintiff only, or to his order. It is not of the least consequence to whom the money, before the loan, belonged. Even if it belonged to Mynderse & Co., beyond all dispute, it does not at all affect the question of the exclusive ownership of the note by the plaintiff. It was plainly matter of agreement amongst all the parties that the money loaned should be paid exclusively to the plaintiff, or to his order. Such was the instrument which the defendants signed and delivered, and it cannot be altered or varied by parol. Conceding that the loan was by the partnership, of which the plaintiff was a member, and was from partnership funds, it was clearly taken out of the partnership transactions, when it was mutually agreed, either expressly or impliedly, that it should be repaid to an individual partner, instead of the firm. It is the same then as though the agreement had been to pay it to a third person, on account of the firm making the loan, and such third person had accepted the obligation. It is then indisputably his chose in action, whatever fund it may have sprung from originally. Evidence that before the money was loaned to the defendants, and became their money, it was the money of two persons jointly, does not prove, or tend in the least degree to prove, that the chose in action they gave in exchange or in consideration of the loan, does not belong to the individual payee to whom alone they promised to pay, and who holds and claims the obligation as his own exclusively. The

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former ownership of the money loaned, affords no presumption on that question, one way or the other. There was clearly nothing to submit to the jury, on that question. The plaintiff was sole payee and holder, and the only proper party plaintiff to the action.

The next question is, whether the evidence offered should have been admitted to prove the counter-claim against the plaintiff and Vancief, set up in the second and third answers. This was a demand which the defendants had, or claimed to have, against the plaintiff and Vancief jointly, as partners, and joint contractors with them. It was for damages arising from an alleged breach of the contract by these two partners. This claim, as is apparent, was not against the plaintiff, but against the firm, of which he was an individual member. Properly there could be no several judgment between the parties to this action, on account of that claim; no judgment which would be conclusive, and operate as a bar, in respect to all the parties interested in the claim. It was not upon its face, or in law, a claim against the plaintiff individually. This is the test. It must be a claim or demand "existing in favor of a defendant, and against a plaintiff, between whom, a several judgment might be had in the action." (Code, § 150.) It was not a demand against the plaintiff alone, but against the plaintiff, and another, jointly bound with him, as a partner. It was a partnership debt, if a demand existed. Partners are not joint and several debtors, but joint debtors only. It was not, therefore, such a counter-claim, as the Code authorizes, and allows to be set up by way of answer between these parties. Nothing is better settled, than the general rule, that a creditor of a partnership is not entitled, as matter of law, to bring a separate action, and have a separate judgment, against one of the several partners, where they are all living. The defendant's counsel relies upon the decision in the case of *Schubart v. Hartean* (34 Barb., 447), as authority for the allowance of the counter-claim in question. What is said by INGRAHAM, J., in delivering the opinion in that case, would seem to cover the position of the defendant's counsel.

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But by looking into the facts in that case, it will be seen that what was said by the learned justice, in regard to the right of a defendant to set up a counter-claim in his favor against the plaintiff, and other persons, not parties to the action, and have it allowed, and recover any balance, unless there was a replication by the plaintiff, that there were other persons liable with him, as partners, was *obiter* merely. The question did not arise in the case then before the court. The action, there, was upon a negotiable, promissory note, transferred to the plaintiff, after it became due. The defendant, by way of recoupment, or counter-claim, offered to prove a claim in his favor for damages arising upon contract, against the parties who transferred the note to the plaintiff, existing at the time of such transfer; and also to prove that he turned out the same note, to such parties, in satisfaction of a claim they had against him upon the contract out of which the damages arose, and before the damages occurred. The court, on objection to the admissibility of the evidence, excluded it, as irrelevant and immaterial, and the case came before the General Term of the first district, on exception to the ruling at the circuit. The only question was, whether the evidence was admissible, by way of defence to the note, in the hands of the plaintiff, as indorsee and holder, after the note became due and payable. It was properly held to be admissible; and all that is said beyond that, in the opinion, was upon a question not before the court. I am clearly of the opinion that this dictum of the learned justice is not the law. The case cited by him to sustain it, does not warrant the proposition. He cites *Briggs v. Briggs* (20 Barb., 477), as authority. But that is no such case. The defendants, in that case, were sued jointly, upon a demand against them as agents or factors of the plaintiff, for property received and sold by them. It appeared in evidence that part of the property was sold by the defendants, while they were doing business together, and part, by one, after they had dissolved their connection as partners in the business of factors. One of the defendants, at the trial, offered, by way of set-off, or counter-

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claim, to the plaintiff's demand, three several promissory notes, made by the plaintiff, and payable to him, the defendant, or bearer. The notes were rejected, as evidence, upon the trial. But the court, at General Term, held that they were admissible in evidence as a set-off, or counter-claim, against the plaintiff's demand. But this was put, as will be seen by referring to the case, expressly upon the ground that the liability of the defendants upon the claim against them, as agents, or factors, in the sale of the plaintiff's property, was several, as well as joint, and that the plaintiff might have had a several judgment against either defendant in the action, on that claim. The grounds of the decision, in the last case, were undoubtedly correct, and the decision was right, if the demand on which the action was brought was several as well as joint, so that the plaintiff might have had a several judgment in the action against either defendant. It fulfilled, in that view of it, precisely the requirements of the Code. To the same effect is the decision in *Parsons v. Nash* (8 How., Pr. R., 454). But neither of these cases support the dictum in *Schubart v. Harteau* (*supra*). According to the rule there laid down, the right to interpose and prove a demand, by way of counter-claim, depends upon the matter and form of the pleadings in the action, rather than upon the general principles of the law. This, I am sure, is not the true meaning of § 150 of the Code. By that section, the demand must be of such a nature and character, that upon the general rules and principles of law, a several judgment may be had upon it in the action. If it is not such, the party offering it is not entitled to use it in that way. The reason of this is, I think, quite obvious. The object doubtless was to have, only those claims used in that way, as to which the judgment of the court would be binding and conclusive upon all the parties in interest. The reply here to the counter-claim set up in the answer, was a general denial. I do not see that any other was necessary, or would have been proper. The Code, § 153, prescribes what the reply may be. It certainly was neither necessary nor proper to reply in a case like

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this, that another person was jointly liable with the plaintiff on the demand set up and offered in evidence by way of counter-claim. It was expressly set up as a joint demand against both the plaintiff and his partner, and upon the ground that the other partner, Vancief, was a joint owner of the note with the plaintiff, and that the action was prosecuted for the benefit of Vancief, as well as the plaintiff. There was, therefore, no new matter to set up by way of reply and defence to the counter-claim. A mere general denial of it, as a defence to the action, was all that the case called for. Had the defendants established their allegations in their several answers, that the other partner, Vancief, was a joint owner of the note, and that the action was prosecuted for their joint benefit, the proof offered by way of defence would have been proper; but as they failed entirely to prove those allegations, the evidence was properly excluded.

A new trial must therefore be denied, and judgment ordered for the plaintiff on the verdict.

New trial denied.

PITT COOKE v. THE STATE NATIONAL BANK OF BOSTON,
impleaded with CHARLES MELLEN, CHARLES H. WARD and
EDWARD CARTER.

(GENERAL TERM, FIRST DISTRICT, JANUARY, 1870.)

On the application for removal of a cause, from a State into the federal court, under § 12 of the U. S. judiciary act of 1789 (1 U. S. Stat. at large, 79; 1 Bright. Dig., 128), all the defendants were required to join. Per BRADY, J.

Norton v. Hayes (4 Denio, 345); *Vandervoort v. Palmer, Cook & Co.* (4 Duer. 677); and *Livingston v. Gibbons* (4 John. Oh., 94), explained. Id.

A like application, under the Law of 1867 (14 U. S. Stat. at large, 558), upon the ground, that from prejudice, or local interest, justice cannot be obtained in the State court, is improperly granted, when made by one of several defendants.

And where an application has been so made by one defendant only, and

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bonds have been furnished and accepted, and an order of removal granted, the error will be corrected on appeal.

So held, on appeal from an order, granted on application made, after issue joined, motion to dissolve attachment denied, the cause noticed and on the calendar for trial, and other proceedings had therein.

Whether the statute authorizes such an application to be made by a corporation, quere. Per INGRAHAM, J.

THIS appeal originally came before the General Term on appeal from a Special Term order, which granted a motion made by the defendant, The State National Bank of Boston, to remove the action into the Circuit Court of the United States for the southern district of New York.

The motion was founded upon an affidavit and petition, accompanied by bonds executed in form as required by the statute (14 U. S. Statutes at large, 558), and served with the following notice upon the plaintiff's attorneys.

Title, &c.

GENTLEMEN.—Please to take notice, that on the annexed affidavit, petition and bond (copies of which are herewith served upon you), I will move this court, at a Special Term, to be held at the chambers thereof, at the city hall in the city of New York, on the third Monday of December, 1868, at twelve o'clock, noon, of that day, or as soon thereafter as counsel can be heard, for an order to transfer, remove and transmit the above entitled action, as far as the State National Bank of Boston is concerned, together with all process, pleadings, depositions, testimony and other proceedings therein, to the Circuit Court of the United States for the southern district of New York.

Dated December 10, 1868.

Yours, &c.,

JOHN H. PLATT,

*Attorney for the Defendant, The State
National Bank of Boston.*

To Messrs. BURRILL, DAVISON & BURRILL,

Plaintiff's Attorneys.

The affidavit and petition, were as follows, viz. :

Title, &c.

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CITY OF BOSTON, COUNTY OF SUFFOLK, }
State of Massachusetts, } ss:

We, Amos W. Stetson, the President, James P. Thorndyke, Samuel T. Dana, Abner Kingman, James McGregor, Daniel N. Spooner, John Field, Joshua Stetson, James P. Melledge, and Robert M. Mason, directors of the State National Bank of Boston, a banking association under the laws of the United States, located at Boston, county of Suffolk, commonwealth of Massachusetts, severally, upon information and belief, do declare, and upon oath say, that a suit instituted by Pitt Cooke, of the city, county and State of New York, is now pending against the said State National Bank of Boston, in the Supreme Court, city, county and State of New York; and we do, each for himself, severally, on oath, say, that at the time of the commencement of this action, to wit, on the sixth day of March, in the year eighteen hundred and sixty-seven, and prior thereto, we and the president and other officers of said banking association, were, each of us, citizens of the State of Massachusetts, and have ever since continued to be and now are citizens of said State, and residents thereof. We also, each for himself, severally do declare, and upon oath say, that we have reason to believe, and severally do believe, that from prejudice and local influence, the said State National Bank of Boston, will not be able to obtain justice in the said suit in the said State court.

Signed, &c., and duly verified.

Title, &c.

And now the State National Bank of Boston, defendants in the above entitled suit, which is now pending in said Supreme Court, and before the final hearing or trial thereof, come and request, and do present this their petition, that the said suit and copies of all process, pleadings, depositions, testimony, and other proceedings in said suit may be removed and transferred into the Circuit Court of the United States, next to be held within and for the southern district of New York.

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Your petitioners aver, that at the time of the commencement of the above entitled suit, Pitt Cooke, the plaintiff therein, was and still is a citizen of the State of New York, the State in which the said suit was instituted and brought, and is now pending. They also aver, that the matter in controversy, and in dispute between the parties, exceeds the sum of \$500, exclusive of costs.

Your petitioners also aver, that the said State National Bank of Boston, on the fourth day of April, in the year eighteen hundred and sixty-five, being a corporation under the name of the State Bank, created by a law of the State of Massachusetts, for the business of banking, and having its place of business in the city of Boston, in the State of Massachusetts, did become a banking association under an act of congress, which was approved the 3d of June, A. D. 1864, entitled "an act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and have ever since continued and remained such association, established and having its place of business in said city of Boston.

Your petitioners present herewith an affidavit, made by the president and directors of the said State National Bank of Boston, in support of this their petition and application for the transfer and removal of the above entitled suit, into the Circuit Court of the United States as aforesaid, to which they refer, and make the same a part hereof.

And your petitioners show to the court, that each and every one of the directors of said bank, and its president and other officers, were, at the commencement of this action, and have continued to be, and now are, citizens of the State of Massachusetts, and residents thereof.

Your petitioners offer, and are ready to give good and sufficient surety, that they will enter in the said Circuit Court of the United States, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and that they will then and

there, appear in the said Circuit Court of the United States, and will then and there answer to the said suit.

(Signed)

THE STATE NATIONAL BANK OF BOSTON, { Seal of State Nat.
Bank of Boston. }

by AMOS W. STETSON, *President.*

CITY OF BOSTON, COUNTY OF SUFFOLK, } ss :
State of Massachusetts,

Amos W. Stetson, being duly sworn, saith, that he is the president of the State National Bank of Boston; that he has read the foregoing petition subscribed by him as such president, and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed)

AMOS W. STETSON.

Sworn, &c.

(Signed)

A. W. ADAMS,

[L. S.]

Commissioner for the State of New York.

The application was resisted by the plaintiff upon the following affidavit:

CITY AND COUNTY OF NEW YORK, ss:

Charles D. Burrill, being sworn, says, that he is one of the attorneys for the plaintiff herein.

That the action was commenced on 6th March, 1867, and that the defendant appeared in the action by attorney, and the answer of the defendant herein was served on the 2d day of April, 1867, and that the cause was noticed for trial for the May term, 1867, and was on the calendar for trial for that and succeeding terms, and is still on the calendar.

That on the 8th June, 1867, a notice of motion for the third Monday of June, 1867, to set aside the attachment herein, was received by plaintiff's attorneys, and the motion was argued and denied; and that the defendants appealed to the General Term, and the order was there affirmed and rule entered on 10th day of April, 1868.

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That a motion was made by defendants to amend the answer, and such leave was granted, and an amended answer interposed.

That in April, 1867, an order was entered for the issuing of a commission, which was issued in July, 1867, and duly executed and returned in August, 1867, and defendant joined in such commission.

That in August, 1867, defendants issued a commission to Europe to examine a witness in their behalf, and such commission was executed and returned.

That in November, 1867, another commission was issued to Boston, and executed and returned.

That the motion to discharge the attachment was argued in November, 1867, and denied in December, 1867.

That the defendants amended the answer in December, 1867.

That in April, 1868, the order denying motion to set aside the attachment was affirmed on appeal.

That in October term, 1868, the cause being on the calendar, and it appearing likely that it would soon be reached, arrangements were made between the attorneys for the respective parties for setting down the cause for a day certain, to accommodate foreign counsel and witnesses.

That on December 3d, 1868, the order to show cause why the cause should not be transferred to the federal court was received. This deponent, on information and belief denies, that the defendant, the State National Bank of Boston, is a citizen of the State of Massachusetts; but that, as appears from an affidavit of A. W. Stetson, president of defendant, bank, used on the motion to set aside the said attachment, the said bank is a national banking association, for carrying on the business of banking, and created such under and by virtue of the laws of the United States, and was in April, 1865, organized, under the act of congress of June 3d, 1864, entitled "an act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved 3d June, 1864."

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And that it was authorized by the comptroller of the currency, pursuant to the directions of said act, to commence the business of banking, and that since April, 1865, it was engaged in the business of banking under the said act of congress.

And this deponent further says, that the said bank is not the only party defendant in this action, but that there are three other defendants herein.

Signed, sworn, &c.

The Special Term made an order, "to transfer, remove, and transmit the above entitled action, as far as said bank is concerned, together with all process, pleadings, depositions, testimony, and other proceedings therein, to the Circuit Court of the United States for the southern district of New York," &c.; and also approving of, and accepting the surety given upon the bond offered, and bond itself declared, "that this court will proceed no further in this action as against the said defendants, the State National Bank of Boston."

An appeal was taken from this order to the General Term, where, after hearing before CLERKE, PECKHAM and INGRAHAM, JJ., it was reversed, and the following opinion was given:

By the Court—INGRAHAM, J. This is an appeal from an order directing the removal of the cause to the United States Court, under the act of congress, passed in 1867. This act was amendatory of the act of 1866, but the amendment does not repeal anything contained in the act of 1866; but adds to it the provisions of the act of 1867.

In order to remove a cause under the latter act, it appears to be necessary for the party seeking the removal, to make an affidavit that he has reason to and does believe, &c., he will not be able to obtain justice in the State Court, and file the same with a petition, and offer the requisite security for proceeding in such court; and thereupon in actions where the matter in dispute exceeds \$500, the State Court is directed to accept the security, and proceed no further in the suit.

It is unnecessary here to decide whether an order of the

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State court is necessary for such removal. It is very clear, if the statute is not in all respects complied with, no removal takes place, either with or without such order.

If the amount in controversy does not exceed \$500, or if the security offered is not good and sufficient, or if the proper papers are not filed, or the proper affidavit made, no removal takes place.

It appears to me, in the present case, the act has not been complied with. This statute does not provide, as the act of 1866 does, that such removal may take place as to one of the defendants, nor that such application may be made by one defendant without the others. On the contrary, it requires the defendant, against whom the action is brought, or the plaintiff, if he wishes the removal, to make the affidavit. It cannot be pretended that one plaintiff, where there are more than one, can so remove the cause, nor does the law provide for one defendant to remove as to himself. The act evidently contemplates an action between a sole plaintiff and a sole defendant; or, if there are more parties, then all the plaintiffs or all the defendants should unite. The character of the act, its object, and its effect upon litigation in the State courts, is not such as to call for a liberal construction of its privileges. On the contrary, it should be strictly construed, and a party seeking to avail himself of its privileges, must come clearly within its provisions. Such does not appear to be the case here, and while there are other defendants who do not unite in the application, I am of the opinion that one defendant has no right to the benefit of the statute. There is also one objection made to the fact, that the statute does not apply to a corporation, because a corporation cannot make the affidavit required, and the belief of other persons than the defendant is not a compliance with its provisions. The objection is not without weight; and it may well be doubted whether an affidavit, made by one or more of the directors, is a compliance therewith, but it is unnecessary to decide on that question.

It is objected that this cause has been removed by the order of the Special Term, and is now out of this court, and, there-

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fore, that an appeal will not lie. Upon the argument, such was my impression; but on further reflection, I am satisfied that such an objection should not be sustained, if the necessary acts to perfect the removal have not been taken. If one defendant cannot remove the cause, or if proper security is not given, then the order was erroneous, and no such removal has taken place, as would prevent the court, on appeal, from correcting the order.

I do not think, under this act, that one defendant can remove the cause without the others; and there is nothing to prevent this court from correcting the order appealed from. The order should be reversed.

A motion was subsequently made for a rehearing, and granted; and thereupon the appeal was reargued by

John Slosson and *E. W. Stoughton*, for the appellant.

John E. Burrill, for the respondent.

Present—INGRAHAM, BARNARD, and BRADY, JJ.

By the Court—BRADY, J. The application to remove this cause to the United States Court was made under the act of congress, passed March 2, 1867. (2 Brightly Dig., 116; 14 Stat. at Large, 558.) All of the defendants do not unite in it. Under the 12th section of the judiciary act (1 Stat. at Large, 79), it was necessary that all the defendants should join in the application. (*Beardsley v. Torrey*, 4 Wash. C. C. Rep., 286.)

It has not been held otherwise in this State. The cases to which we were referred in the argument, namely, *Norton v. Hayes*, (4 Denio, 245), *Vandervoort v. Palmer, Cook & Co.*, (4 Duer, 677), and *Livingston v. Gibbons*, (4 John., Ch. R., 94), seem to have been misunderstood. In the first of these cases the action was for an alleged tort against three defendants. The *scapias* was served on one only, the others being returned, not found. The right of the plaintiff to proceed in such an action against one defendant only, was recognized and

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declared, and the cause held to be one against the defendant served only. This view was in response to the point taken by the plaintiff's counsel, that all the defendants should have joined in the application. In the second case the action was brought against a firm, of which Palmer was a member, and upon him alone the process was served. The right of the defendant served to apply, was based upon the right of the plaintiff to proceed against him, in this State, and to obtain a judgment which would bind his separate estate, and the property of the partnership. It was not necessary to serve the other defendants. This view was in answer to the objection also taken in that case, that all the defendants should have united in the application to remove the cause. In the third case, it was held that where there is no joint trust, interest, duty or concern in the subject-matter of the controversy, a defendant, who is a resident of another State, may be allowed on his application to appear and defend alone so as to enable him to remove the cause. In none of these cases was it doubted or questioned that all the defendants must unite in the application to remove the cause; and the necessity of that element in the proceeding was conceded. Under the act of congress, passed 27th July, 1866 (14 Stat. at Large, 306), application may be made by one defendant if the action has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which it clearly appears that there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause. (*Hodykins et al. v. Hayes*, Common Pleas, 1869.) But the action may proceed as to the other defendants. The amendment to this act (2d March, 1867, 14 Stat. at Large, 558), provides that "where a suit is then pending, or may thereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds five hundred dollars exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such

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State court an affidavit stating that he has reason to and does believe, that from prejudice or local influence, he will not be able to obtain justice in such State court, may at any time file a petition, &c. ;” and on complying with the requirements of the statute as to surety and other appropriate acts, it shall thereupon be the duty of the State court to accept the surety and proceed no further in the suit. The act of 1866, and the amendment thereto, it will be seen, provide for different classes of cases and with different results. The act of 1866 contemplates an application by a defendant, and one of several defendants, if the conditions stated exist, and provides for the continuance of the action as to defendants in the State court, who have not united in the application to remove. The amendment provides for the removal of the action, on application therefor, from the State court, and prohibits any further proceeding therein in such court. The language employed in the act of 1789, and in the amendment to the act of 1866, is substantially the same, and leads to similar conclusions. In the former, the words are: “If a suit be commenced by a citizen of the State in which the suit is brought, against a citizen of another State ;” and in the latter the provision is: “between a citizen of a State in which the suit is brought, and a citizen of another State.” The acts of 1866 and 1867 enlarge the time in which the application may be made ; but that does not affect the question under consideration. It seems to be clear, that if a joinder of all the defendants is necessary, under the act of 1789, it is equally necessary under the act of 1867. It may also be remarked here, that the act of 1866 had made provision for the removal of an action from the State courts by one of several defendants, specifying the circumstances which must occur to justify such a proceeding, and for the continuance of the action in the State court as to the other defendants, notwithstanding such removal. The amendment makes no provision for such continuance, and does not in terms, provide for the removal by one of several defendants, and to it must be applied the maxim, *Expressio unius est exclusio alterius*. This construction of the statute

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is reasonable and just. The defendants who do not unite in the application, should not be compelled to submit to a change in the tribunal before which they have been summoned, if the cause, being removed, may proceed against them in the United States court, as one of original jurisdiction; and if it cannot thus proceed, the plaintiff should not be required to yield the proceeding against them, accomplished by the commencement of this action, in the absence of express authority for such a result.

It is unnecessary to proceed any further in the consideration of the other questions argued, having arrived at the conclusion stated. The opinion of Justice INGRAHAM, delivered at a former General Term of this court, affirms the right of the plaintiff to appeal, and to be heard upon the propriety of the order of removal. There is nothing in the case of *Stevens et al. v. The Phoenix Fire Ins. Co.*, of Hartford, recently decided in the Court of Appeals, in conflict with the views herein expressed. In that case the court determined, that the defendants were a non-resident corporation, and that when the statute was strictly complied with, the State court had no further jurisdiction. The application therein was made under the twelfth section of the judiciary act, and the defendant being a citizen of another State, within the meaning of the act, there was no doubt of the validity of the removal. Our view is, that the statute does not embrace such applications as is made by the defendant, and that it therefore has no application.

The order of the General Term heretofore pronounced should be affirmed.

Order affirmed.

Mackay v. Mackay.

JOHN MACKAY, Appellant, v. ANDREW MACKAY, CHARLES C MACKAY, and HENRY MACKAY.

(GENERAL TERM, FIRST DISTRICT, JANUARY, 1870.)

In an action to recover possession of merchandise, the plaintiff, to establish his title, proved that he had given an order upon the manufacturers in England, through two of the defendants as his agents, for the articles to be made and sent to him at New York, and had received from such manufacturers, notice of the acceptance of the order; but that said defendants having terminated their agency, had substituted one of themselves in the order as the person for whom the goods were to be manufactured; and that the manufacturers under the direction of the defendant, so substituted, had forwarded the same with knowledge of the plaintiff's claim, to the other defendants at New York, by whom they had been received.—*Held*, the plaintiff established no title which would enable him to maintain the action.

THE plaintiff was a crockery merchant in New York, and had his brothers Charles and Henry, the defendants, in his employ. The defendant, Andrew Mackay, another brother, who lived in England, was in the habit of executing orders for him there.

Charles, while still in the plaintiff's employ, made a visit to England, and being authorized to make certain orders there, for the manufacture and shipment of goods to the plaintiff, he, in connection with Andrew, arranged for the manufacture and delivery of certain goods to the plaintiff, with Livesly, Powell & Co., who sent information of the fact, to the plaintiff. Afterward, in consequence of a disagreement, Henry and Charles left the plaintiff's employ, and formed a business connection under the firm name of "Mackay Brothers," and Andrew altered the order, given on behalf of the plaintiff to Livesly, Powell & Co., so as to direct the goods to be manufactured for himself; and in pursuance of his, Andrew's, directions, the first parcel of the goods was shipped to Charles and Henry, by the manufacturers, who had been told of the disagreement between plaintiff and his brothers, by Andrew, at

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the time he altered the order, and had notice of plaintiff's claim to have the goods sent to him. On receipt, by the defendants, of the goods in this country, plaintiff commenced this action, claiming the goods as his, and obtained possession thereof.

Upon the trial, the justice held that no title had passed to the plaintiff, and so instructed the jury, and the jury found for the defendants. The plaintiffs excepted to the judge's ruling and charge and appealed to this court.

John C. Dimmick, for the appellant.

John E. Burrill, for the respondent.

Present—INGRAHAM, BARNARD and BRADY, JJ.

By the Court—INGRAHAM, P. J. The only question in this case is, whether the plaintiff ever acquired such a title to these goods as will enable him to maintain this action for claim and delivery. Conceding that the defendants are liable to the plaintiff in an action for damages for violation of their duty as agents, still that does not establish the plaintiff's title to the goods in question. The contract was executory. Before it was performed, the person who had made it as agent altered the terms of it, and directed the property to be delivered to himself. It was so delivered as manufactured for him, and paid for by him. There never was any delivery to the plaintiff nor to any one on his behalf.

No one would contend if this sale had been made to a stranger and he had paid for the goods, even with knowledge that they had been made under an order of the plaintiff, that the plaintiff had any title which would enable him to take them out of the possession of such purchaser; and yet if the title vested in him before actual delivery, he could maintain an action against a purchaser with knowledge of his claim, as well as against any other person who had become wrongfully possessed of the property.

In *Andrews v. Durant* (11 N. Y., 35), DENIO, J., says: "A contract for anything not *in esse* does not vest any property in the party for whom it is agreed to be constructed during

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the progress of the work, nor until it is finished and delivered or at least ready for delivery and approved by such party." (*Merritt v. Johnson*, 7 John., 473.)

So it has been held that where a party, acting in a fiduciary relation to another, purchases the trust property to his own use, still the legal title is in him and the remedy is in equity. (8 Wendell, 426; 27 N. Y., 567.) I see nothing in the relation existing between these parties to alter this rule. Admitting that the defendants violated their duty as agents, and have made themselves responsible as such to the plaintiffs, that does not vest the title to the property in them or give the plaintiff any right to the possession.

The judgment should be affirmed with costs.

Judgment affirmed.

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IN THE MATTER OF FRANCES M. WINNE, AN INFANT.

(SPECIAL TERM, NIAGARA COUNTY, MAY, 1869.)

The husband's common law estate of tenancy by the curtesy, is abolished in this State, in all the real property of the wife, affected by the married women's acts of 1848 and 1849.

FRANCES M. WINNE, an infant, applied to the court by her next friend for leave to sell certain real estate, descended to her as heir of her mother, now deceased.

The title of the mother accrued after the acts of 1848 and 1849, for the more effectual protection of the property of married women. The father of the infant claimed an interest in the real estate of his deceased wife, as tenant by the curtesy, and offered to join in a conveyance of such interest in case the court ordered a sale of the infant's interest therein, on being paid the estimated value of his life estate. The referee reported the value of the premises, and the amount of the father's interest therein as tenant by the curtesy; and the question arose, whether the proceeds of a sale, if ordered, would

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belong exclusively to the infant, or whether the father's claim was valid as tenant by the curtesy.

Sylvester Parsons, attorney for the petitioner.

LAMONT, J.' There never has been a time in the history of the common law, when the husband's tenancy by the curtesy began upon the wife's decease, or was affected by the laws of descent. Such tenancy is an estate of freehold in the husband, which cannot arise at or after the death of the wife, but must vest in him during her life-time, and during the actual continuance of the marriage. Whatever interest in the wife's inheritance accrues to others upon her death, cannot, by the nature of the case, be a tenancy by the curtesy, as such estate is defined by the common law. The heir can only take by the death of the ancestor, but the husband must take his tenancy by the curtesy while the wife still lives. At common law, by virtue of the marriage alone, the husband became vested with the right of possession, and the beneficial use, during the joint lives of himself and wife, of her estates of inheritance, of which she was seized during coverture; but such estate in him acquired by the marriage, was not a tenancy by the curtesy. To enable the latter estate to exist, there must have been not only a marriage, and seizin of the wife, but the birth of living issue, capable of inheriting as heir to the mother, whereupon instantaneously a freehold estate in the realty of which she was, or during the marriage might become seized, passed to the husband for the whole period of his life; and this freehold co-existed with his life, unaffected by the circumstance of her death, and constituted the anomalous estate denominated tenancy by the curtesy. As this tenancy was not terminated by the wife's death, nor affected by any law of descent, so it had nothing in common with the laws of succession of the wife's personal property.

From the time of 31 Edward III, the husband has been entitled, by statutory provisions, to administer the deceased

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wife's personal effects. Some authorities have derived his title to her personal estate, after her decease, from such right to the administration, while others assert that such title in him existed at common law. (*McCosker v. Goldes*, 1 Bradf., 64; *Westervelt v. Gregg*, 12 N. Y. Rep., 206; *Ransom v. Nichols*, 22 id., 112; Toller on Executors, 83-4.) Blackstone asserts the common law right of the husband, not only to administer, but also to enjoy, exclusively, the effects of his deceased wife (2 Black., 515); and the Court of Appeals, in an exhaustive opinion, written by the late Judge WRIGHT, have demonstrated, that as to the personal estate of the deceased wife, the husband was, before the statute of 1848, entitled to the choses in action, and other personal estate of the wife, after her death, because the interest was *vested* in him, by virtue of the marriage, *before* her death. (*Ryder v. Hulse*, 24 N. Y. Rep., 372.) The acts of 1848-9 abolished such pre-existing interest of the husband, as to property coming to her during the coverture, after the enactment of those statutes; and such personal property of the wife, left undisposed of by her, at her death, he takes, by the statutes giving him preference, in the administration, over any other person. (2 R. S., 74, § 27, but now materially amended, chap. 782, Laws of 1867, § 6; 2 R. S., 75, § 29.) But his exclusive right to her effects, after paying her debts, in course of administration, heretofore secured (2 R. S., 75, § 30, and p. 98, § 79), has been taken away by the statute of 1867. The above thirtieth section of the Revised Statutes has been repealed. That section provided that "if letters of administration on the estate of a married woman, shall be granted to any other person than her husband, by reason of his neglect, refusal, or incompetency to take the same, such administrator shall account for, and pay over, the assets remaining in his hands, after the payment of debts, to such husband, or his personal representatives." The Laws of 1867 effected another important change in the husband's rights of succession to the wife's personal estate.

By the above § 79 (Revised Statutes), it was provided that

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“the preceding provisions respecting the distribution of estates *shall not apply* to the personal estates of married women ; but their husbands may demand, recover and enjoy the same, as they are entitled by the rules of the common law.” The act of 1867 amended that section, so as to read as follows : The preceding provisions respecting the distribution of estates *shall apply* to the personal estates of married women dying, *leaving descendants them surviving* ; and the husband of any such deceased married woman shall be entitled to the same distributive share in the personal estate of his wife to which a widow is entitled in the personal estate of her husband by the provisions of this chapter, and *no more*. (Laws of 1867, chap. 782, § 11.)

It is important to bear in mind that express statutory enactments have determined the succession of the wife's personal effects, because, as will be hereafter observed, an argument had been, before the change of 1867, built upon that circumstance favoring the husband's right to hold as tenant by the curtesy in her real estate, by some supposed analogy between the cases, which however, rest in principles entirely distinct and now made conspicuously so by the legislation of 1867.

The act for the more effectual protection of the property of married women (Laws of 1848, chap. 200, p. 307), and the act to amend the same (Laws of 1849, chap. 375, p. 528), wrought a radical change in the common law.

In respect to all property subsequently acquired by married women, or by single women before their marriage, these statutes have industriously excluded their husbands from every right and title therein, or to the possession, control, use and enjoyment thereof, and of its rents, issues and profits, which had been conferred by the common law.

A married woman may now take real and personal property, by inheritance, gift, grant, devise and bequest, from any person other than her husband, and hold the same to her sole and separate use, and convey and devise it, or any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she was unmar

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ried, and the same is not subject to the disposal of her husband nor liable for his debts; and property real and personal, owned by a woman at the time of her marriage, and the rents, issues and profits thereof, are no longer subject to the husband's disposal after marriage, nor liable for his debts, but continue her sole and separate property as if she were a single female.

The common law gave the husband, by the fact of marriage, and during coverture, the usufruct of all the real property of the wife; that is to say, of all the lands, tenements and hereditaments which she may have had in fee simple, fee tail or for life (Reeves' Domestic Relations, 27), which was a freehold estate in the view of the law, being an estate for life, since it might, by possibility, last during his life, and having no certain determinate period. (Id.; 4 Kent, 26; 1 R. S., 722, § 5; Greenleaf's Cruise, title 1, § 13.)

It is not questioned but that this freehold of the husband in his wife's real estate is abrogated by the statutes of 1848 and 1849; for as it never could continue after the wife's death, but was vested in the husband only during coverture, its existence is totally inconsistent with the express provisions of those statutes. That freehold estate of the husband is for the future abolished in this State, together with the absolute title which, by the common law, the husband acquired by marriage to all the wife's personal property in possession. (2 Black., 433.)

It remains to be seen whether that other estate denominated a tenancy by the curtesy can longer exist in favor of the husband in the real property of the wife, to which she may have become entitled since the passage of the acts in question.

Tenancy by the curtesy is an estate for life created by the act of the law (4 Kent, 27). The tenant for life has a right to the possession and annual produce of the land, during the continuance of his estate, without having the *proprietas*, that is, the absolute property and inheritance of the land itself, which is vested in some other person. (Greenleaf's Cruise, title 3, chap. 1, § 1.)

If this estate of tenancy by the curtesy becomes *vested in*

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the husband during the wife's life, as the essential condition of its existence, then it is too plain for argument, that the enactments of 1848 and 1849 have annihilated it for the future, because those statutes, in the language of the Court of Appeals, divest the title of the husband "*jure mariti*" during coverture, and enable the wife to take the absolute title as though she were unmarried. (*Knapp v. Smith*, 27 N. Y. R., 279.)

In treating of curtesy, the authorities usually say that four things are necessary to make this estate complete, to wit: Marriage, seizin of the wife, issue and death of the wife (Bouvier's Law Dictionary, *sub nom estate by the curtesy*.) But the fourth requisite always receives the material qualification that the husband's estate is *initiate* on issue had, and *consummate* on the death of the wife. (4 Kent, 29; Co. Litt., 30 a 2 Blackstone, 127.)

Now as to the marriage and seizin, little need be said; but respecting the issue and death of the wife, these deserve careful examination.

The issue must be born alive and during the marriage, and capable of inheriting as heir to the mother; and the issue must be born during the life of the mother, for if the mother dies in labor, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy, because at the instant of the mother's death he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb, and the estate being once so vested, shall not afterwards be taken from him. (2 Black., 127; Co. Litt., 29 b; *Marcellis v. Thalheimer*, 2 Paige, 42; Greenleaf's Cruise, title 5, chap. 1, § 17.)

The law writers and adjudged cases all concur that tenancy by the curtesy *must vest* in the husband *before* the death of the wife and *during coverture*, and when so vested the husband becomes at once entitled to and seized of this species of freehold, for his own life; that is, while his wife is living he is then already entitled to the possession and annual produce of

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the wife's real estate, by a right and title which continue for and during his own life. Before the wife dies, the husband has already, in her lifetime, acquired this estate, which is his freehold, subject to his disposal, and liable to sale on execution for his debts.

The estate is called *initiate* during the wife's life, and *consummate* upon her death; but when *initiate* it is his freehold, and when consummate it is nothing more.

If it can be demonstrated that the husband, at common law, took some new estate in the wife's lands by her death, to which he was not entitled during her life, then it must be conceded that such new estate thus acquired will remain unaffected by the statutes of 1848 and 1849.

But if upon her death, he took, by the common law, no new estate in her inheritance, then the conclusion would seem incontrovertible, that whatever interest he may have acquired during her lifetime is now abolished by the provisions of those statutes, and this presents a problem to be solved by authority.

Forty-five years ago, the Supreme Court of this State decided that upon execution against the husband, who was tenant by the curtesy *initiate*, a sale of his interest in the wife's real estate (the wife then living) carried to the purchaser the husband's whole life estate as tenant by the curtesy; and it is remarked in *Sleight v. Read* (18 Barb., 161), that such is now considered the settled law, having never since been questioned. (*Schermerhorn and Clute v. Miller and wife*, 2 Cow., 439.) In *Jackson v. Mancius* (2 Wend., 357), the tenant by the curtesy *initiate* during the lifetime of the wife, and two years before her death, conveyed the premises away by deed; and it was held that such conveyance carried to the grantee the husband's entire interest as tenant by the curtesy for and during his life, which was a material point for decision.

In *Van Duzer v. Van Duzer* (6 Paige, 366), it was held that a sale, upon execution against the husband, of his interest in the real estate of his wife, *then living*, such interest being that of tenant by the curtesy *initiate* only, would carry to the purchaser the husband's interest or freehold *during his life*, and

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the chancellor expressed regret that he was not able to find any principle either of law or of equity which would authorize the Court of Chancery to interfere with the husband's legal estate as tenant by the curtesy *initiate*, in his wife's real property so as to place it beyond his reach and the reach of his creditors (p. 367-370).

In *Ellsworth v. Cook* (8 Paige, 643), the same doctrine is again affirmed and the chancellor regarded tenancy by the curtesy *initiate* while the wife was living as a vested estate in the husband and a judgment recovered against the husband as a lien upon it to the value of his life estate (p. 646, 647).

In *Riker v. Darke* (4 Edwards, Ch. Rep., 668), it was held that the grantee of a tenant by the curtesy *initiate* has a sufficient estate in lands upon which to base a partition suit.

Coke says, if after issue the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband to the exclusion of the heirs, so that the husband might dispose of his life estate by the curtesy while the wife was living, which is the same law as held in *Jackson v. Mancius, supra* (Co. Litt., 30 a.); and Coke puts a case where the wife's right and title expire with her life so that she had nothing by way of interest to leave to the husband or to the heir at her death, and yet the husband's tenancy by the curtesy continued, thus: "If a woman tenant in tail general taketh a husband and hath issue, which issue dieth, yet the husband shall be tenant by the curtesy, because he was entitled to be tenant *per legem Angliæ* (i. e., by the curtesy) before the estate tail was spent." (Co. Litt., 30 a.) It is to be observed that the estate in tail became spent or ended by the death of the wife, she leaving no issue to continue the inheritance, and the husband's title as tenant by the curtesy became vested before her death, for her entire interest terminated with her life.

Cruise says, the estate by the curtesy was not derived merely out of the estate of the wife but was given to the husband by the *privilege and benefit of the law*; for as soon

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as the husband had issue, his title became initiate, and could not afterward be defeated by the death of the issue which being the act of God, ought not to turn to his prejudice. (Greenleaf's Cruise, title 5, ch. 2, § 8; citing Paine's case, 8 Rep., 34.)

This privilege and benefit of the law attach to the estate by the curtesy when the estate commences upon the birth of issue during the wife's life-time; for the law could give no privilege or benefit to the husband in her estate after her whole interest was ended, the entailed estate ceasing with her life for want of proper heirs to continue the inheritance. Blackstone says, as soon as any child was born, the father began to have a *permanent interest* in the lands; he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and *this estate being once vested in him by the birth of the child*, was not suffered to determine by the subsequent death or coming of age of the infant. (2 Black., 127.)

It is incontrovertible that all the right, title and interest of the husband called tenancy by the curtesy *initiate*, which must *ex necessitate* accrue to the husband during the wife's life, must now be abolished, and swept away by existing statutes, because so much at least of the husband's estate is absolutely inconsistent with the express language of the legislature; and this point was expressly adjudicated in *Thurber v. Townsend* (22 N. Y. R., 517).

Although we read of this tenancy becoming *consummate* upon the wife's decease, I have not been able to discover that it is in any respect, different in quality or quantity, from the same estate when called *initiate*; when *initiate*, the husband has a life estate in the land, which he may convey to others (*Jackson v. Mancius*, *Riker v. Darke*, *supra*), and which may be sold on execution against him (*Schemerhorn v. Miller*, *Van Duzer v. Van Duzer*, *Ellsworth v. Cook*, *supra*); and the purchaser in either case, during the wife's life-time, acquires the entire right of the husband during his life. As before stated the husband, by the marriage alone, became entitled at

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common law to a freehold in the wife's lands during the marriage; that is, for the joint lives of husband and wife.

Tenancy by the curtesy beginning with the birth of issue, is another freehold of the husband in the same lands; a freehold for his own life, which is a superior freehold to the other. These two estates of freehold must co-exist in the husband, and run together during their joint lives, it remaining a contingency during that period, whether both will cease together, or whether curtesy will outlast the other freehold interest. They will both cease together in case the husband dies before the wife; but if the husband survives her, then the estate by the curtesy being already vested in the husband for his whole life, is separated in point of duration from his other freehold, and exists separate, and distinct from it. It is thus *consummate*. It might also with propriety be called *consummate* after the death of the wife for the further reason, that during the wife's life-time it might, under certain circumstances, be defeated by her attain of felony (Co. Litt., 40 a), or by her being found an idiot. (Id. 30 b.)

Cruise, in his comprehensive digest of the laws of real property, devotes two whole chapters to the discussion of tenancy by the curtesy, but does not attempt to show that curtesy *consummate* is a different estate from curtesy *initiate*. He dismisses this whole subject in two and a half lines with the remark, that, "the fourth and last circumstance required to give a title to curtesy is the death of the wife, by which the estate of the husband becomes *consummate*." (Title 5, chap. 1, § 24.) Nor does Coke or Blackstone, or Kent, add to our information upon this interesting point of inquiry. They all agree, however, that the estate is vested in the husband before the death of the wife, which is the important inquiry before us. We have seen that by the ancient laws, as well as by the judicial decisions in this State, curtesy *initiate* and curtesy *consummate* are but the same estate. It is liable to execution and sale to the same extent before as after the death of the wife. Chancellor WALWORTH treats tenancy by the curtesy, in case the husband survives the wife, as the *continuance* of his estate

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as tenant by the curtesy *initiate*. *Ellsworth v. Cook* (8 Paige, 645), and the judicial determinations of our courts, already referred to, make it certain that the one is but the *continuation* of the other, and that the whole estate vests in the husband during the wife's life-time as fully and absolutely as it can ever be enjoyed by him. Coke says: "and it is adjudged in 29 E. 3, that the tenant by the curtesy cannot claim by a devise and waive the state of his tenancy by the curtesy, because, saith the book, the *freehold commenced in him* before the devise *for term of his life*." (Co. Litt., 30 a.)

And again: "A woman taketh husband, and hath issue; lands descend to the wife; the husband enters, and after the wife is found an idiot by office, the lands shall be seized by the king for the *title of the tenancy by the curtesy* and of the king, begin at one instant, and the title of the king shall be preferred." (Co. Litt., 30 b.)

Now, the *instant* here mentioned is the very moment the lands descend to the wife; by office found the king's title relates to that time, and is preferred over the husband's by virtue of the royal prerogative. The citation is important to show that the *husband's title*, as tenant by the curtesy, began, accrued, or vested before the death of the wife.

Under our present statutes this estate cannot have any beginning; there can now be no tenancy by the curtesy *initiate*; the wife holds the entirety of her real estate as long as she lives, whether she have issue or not, as if she were unmarried. It is her sole property; her separate estate; not subject to the disposal of her husband nor liable for his debts.

Since the statutes of 1848 and 1849, conflicting opinions have been entertained concerning their effect upon the husband's interest as tenant by the curtesy.

The difficulty, as I apprehend, grows out of the erroneous supposition that this interest, denominated *initiate* at one period and *consummate* at another, is not at all times one and the same estate.

The authorities already cited refute such supposition, and furnish a correct exposition of the real qualities of this species

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of tenancy as it had long been settled before these acts became laws.

In *Hurd v. Cass* (9 Barb., 366), decided very soon after these statutes took effect, Mr. Justice MASON, held at Special Term, that such estate still subsists in the surviving husband.

The reported opinion of the learned justice appears to be founded upon the idea that this tenancy is an estate which, upon the principles of the common law, the husband *acquired in the wife's lands at her death* (p. 368); and he further proceeds to say, that, "at common law, the husband, upon the marriage, became seized of a freehold estate "*jure uxoris*" in the wife's lands, and took the rents and profits thereof, during their joint lives. This was such an interest as the husband might transfer, or as was liable to be sold for his debts, and it was probably *this interest* of the husband in the wife's land to which this clause of the statute (*i. e.* the clause providing that the wife's property shall not be subject to the disposal of her husband nor be liable for his debts) has reference; and not to an *interest which alone vests* and becomes consummate, on the *death of the wife*, where there is a child born alive of the marriage." The error of the learned justice is here manifest; for it is well settled law that the husband might transfer not only the interest mentioned by him, but the tenancy by the curtesy *initiate*, and also that this *initiate* tenancy by the curtesy was liable to be sold on execution for his debts while the wife was living, as fully appears by the cases heretofore cited. When the learned justice says that tenancy by the curtesy *alone vests* on the death of the wife, he is unsupported by authority. The authorities are quite the reverse. He is equally in error when he supposes that curtesy ever accrued by any law of descent. (p. 368.) Neither do I perceive that any light is thrown upon the subject by discussing, as he has done, the further question when equity would, and when it would not, allow the husband to be considered or treated as a tenant by the curtesy in an equitable estate of the wife, or in an estate devised to the wife for her separate use; for this is but an attempt to solve one difficulty by start-

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ing a greater one. Where the intent of the devise or settlement is clear, manifesting a design to give the estate to the wife for her separate and exclusive use, the Court of Chancery will bar the husband of curtesy. (4 Kent, 31.)

The question in chancery, as Justice STORY observes, involves some nice distinctions. (Story Eq. Jur., §§ 1381, 1382, 1383, 1384.)

There is no doubt but that the estates of married women, held under the recent statutes, are strictly *legal estates* (*Colvin v. Currier*, 22 Barb., 371); and the nature of the husband's interest therein (if any); as tenant by the curtesy is to be determined by legal principles. Now, I cannot conceive how the question of the husband's right to a tenancy by the curtesy in the legal estate of the wife can be elucidated by the consideration of the more abstruse question, that concerns the husband's right to be allowed the privileges of such a tenant in an equitable estate of the wife in a settlement upon her, or in a devise to her; for in the latter class of cases, chancery endeavors to approximate toward the principles of the common law; and in equity, the question still is, whether the wife has an equitable estate of inheritance, and what was the design touching the exclusion of the husband. The cases agree, that a settlement upon the wife, or a devise to her, in the terms employed by the statutes of 1848 and 1849, creating a separate estate in her, sedulously excluding the husband and his creditors, would deprive him of curtesy. But how far equity would go, or how short equity would come, in this respect, matters not. Equity never pretended to invent a new kind of curtesy, a sort of estate having no moral foundation. (Greenleaf's Cruise, title 5, chap. 1, § 3.) Equity, when it allowed curtesy, first likened the case to the common law estate, turning for this purpose the equitable into the *similitude* of a legal inheritance.

In *Clark v. Clark* (24 Barb., 581), at Special Term, Mr. Justice MARVIN expressed his concurrence in the opinion of Justice MASON, and upon the principles of the authorities cited by him. He entered into no discussion or argument,

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respecting the time of the vesting of this estate by the curtesy in the husband; and it is, I think, demonstrated by numerous authorities, that Mr. Justice MASON labored under a material mistake upon the hinging point of the question.

In *Billings v. Baker* (28 Barb., 343), at Special, and again at General Term, it was maintained that tenancy by the curtesy is abolished, in opinions of great research and force by Mr. Justice POTTER.

There are other cases reported, in which the judges have expressed conflicting opinions upon the question.

In *Colvin v. Currier* (22 Barb., 371), at General Term in the seventh district, the opinion was expressed, that the acts of 1848 and 1849 were statutes passed in furtherance of the policy of relaxing the strict rules of the common law in respect to married women. Those acts, say the court, repeal the common law rules, giving the husband a right to the personal property of the wife, and a freehold interest in her estate or inheritance, and subjecting the same to the payment of his debts. These acts were designed to take away the marital rights of the husband in respect to such property of the wife (p. 382).

Afterward however, in *Jaycox v. Collins* (26 How., 496), contrary views were expressed at the General Term, in the same district, and that learned court supposed that the acts of 1848-9, were not designed to take away the marital rights of the husband, and that tenancy by the curtesy has survived these acts.

In *Vallance v. Bausch* (28 Barb., 683), at General Term, first district, no question arose in respect to tenancy by the curtesy. The case was an appeal from the surrogate upon the probate of a will of personal property. Afterward, in *Burke v. Valentine* (52 Barb., 412, less fully reported in 5 Abbott, N. S., 164), the decision below did not raise the question of the present existence of the tenancy by the curtesy. The wife, in that case, never had any seizin or right to the possession of the realty; which would be fatal to the husband's claim to be a tenant by the curtesy, both before and

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since the acts of 1848-9, if such tenancy still exists in our law. The Special Term decision was affirmed. The observations at General Term about curtesy were but *dicta*. And such was the case in *Lansing v. Gulick* (26 How., 250); the father having conveyed away his right, whatever that may have been, before the suit was commenced, so that he was turned out of court for want of interest. His complaint must have been dismissed, whether he had been tenant by the curtesy or not. In *Shumway v. Cooper* (16 Barb., 556), nothing is said upon the subject of this species of estate. The same remark will apply to *Blood v. Humphrey* (17 Barb., 660). In *Smith v. Colvin* (17 Barb., 157), the husband's rights accrued before 1848.

In *Beamish v. Hoyt* (2 Robertson, 307), the Superior Court of New York city was of opinion that this tenancy still exists. In *Benedict v. Seymour* (11 How., 176), the Supreme Court in the first district thought it was abolished.

In the Court of Appeals, it was held in *Ransom v. Nichols* (22 N. Y. R., 110), that the husband surviving the wife, was entitled by the provisions of the Revised Statutes, or at common law, to the choses in action of his deceased wife, and that payment to him of a promissory note, held by her at her death, was a valid defence to the debtor, although some third party had obtained letters of administration on her estate. Nothing is said in the case about curtesy, nor does it appear that there had been issue of the marriage. In *Thurber v. Townsend* (22 N. Y. Rep., 517), the wife brought ejectment for land descended to her from her father in 1854. Her husband was living, and there was issue of the marriage also living. The defendants held the premises under a lease from the husband. Here was a case of tenancy by the curtesy, initiate, as such tenancy has always existed at the common law, and still exists, unless the acts of 1848-9 have abolished it. The defendants asked the court to charge the jury, that the husband by his marriage, and the birth of a child, acquired an estate by the curtesy in the land of his wife, which could not be defeated by the legislature. The

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court charged to the contrary, and the defendants took an exception.

There was another question in the case not material to be considered; but upon the point of the charge and exception the Court of Appeals, without a dissenting voice, held that no error was committed (p. 520). This case is directly in point, that tenancy by the courtesy initiate no longer exists.

In *Knapp v. Smith* (27 N. Y. Rep., 277), DENIO, Ch. J., delivering the opinion of the court, says (p. 279), that "at common law as to real property, the husband, where no trust was created, had an estate during the coverture, and during his life, if there was issue of the marriage." It is not suggested that the husband's life estate needs any other support than the marriage, the birth of issue, and the seizin of the wife; her death is not mentioned as an element in the husband's freehold.

The opinions which favor the existence of the husband's tenancy by the curtesy with hardly an exception, since the case of *Hurd v. Cass*, adopt the reasoning in that case, and then apply to real estate by analogy the rules that dispose of the wife's personalty after her death.

That analogy is a fallacy, whether her undisposed of personalty goes to the surviving husband by force of statutory provisions or by the common law, about which different views have been entertained. (*Westervelt v. Gregg*, 12 N. Y. Rep., 202; *Ransom v. Nichols*, 22 N. Y. Rep., 110; *Ryder v. Hulse*, 24 N. Y. Rep., 372.) By whichever right he took he formerly took the whole. If then, he takes by the same right in the realty he would take all the real estate left by the wife. I am not aware that a case ever was known where the laws of succession devolved upon heir or kin a temporary interest in either real or personal property; a mere life estate with remainder to others; nor do I think such an instance can be found in legal history. Such partial estates may be carved out of property by contract or conveyance, or by last will and testament, but the law itself when it gave to heirs or next of kin, gave all.

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No change in the statute of distributions or of any statute respecting personal property, would affect the laws of descent of real estate. The act of 1867, materially changes the husband's interest in the deceased wife's personalty, and if that act had been somewhat older; if it had been originally incorporated into the Revised Statutes, no one would probably have thought of this supposed analogy between the rules that regulate the descent of real and the distribution of personal property left by married women at their death.

By the act of 1867, the absolute right of the husband to the deceased wife's personalty, whether that right formerly existed at common law, or was conferred by statute, has been abrogated, and he is now only entitled to claim his distributive share through due administration in like manner as the widow and next of kin.

By our statute of descents the whole interest of the wife in her estates of inheritance as such interest happens to subsist at the time of her death, then passes to her heirs at law. (1 Rev. St., 751, &c.) It was only the estate which the husband had acquired by the birth of issue of the marriage, in her lifetime, that he continued afterward to hold for the term of his own life, being in fact the mere prolongation of the estate already vested in him while the wife was living. All that he had thus acquired he still retained, after her death, and all that she retained until her death descended to her legal heirs.

The statute of descents was so sweeping in its disposition of the decedent's inheritance that it became necessary to insert a section exempting both the husband's curtesy and the wife's dower, two estates which alike began before the death of the persons from whose estate they were derived, from being abrogated. "The estate of a husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of this chapter." (1 Rev. St., 754, § 20.)

This provision did not create or alter the husband's curtesy or the wife's dower but merely saved them where they had

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become previously vested. (See Revisers' notes to the section.) In other words the statute left them where it found them. Before 1848, every scintilla of the wife's interest in her estates of inheritance, as she owned the same at her death, passed to her heirs by virtue of statutory provisions, and her personal estate by other statutory provisions passed to her husband. As to her realty, the same statutes still give all her interest subsisting in her at her death to her lawful heirs. Considered from every point of view from which the subject is capable of being examined, it would appear that tenancy by the curtesy has been swept away in all cases, where the acts of 1848 and 1849 operate upon the wife's property. Those acts leave the whole quantity of interest in her real estate still in her at the moment of her death, in case of intestacy; at that moment the statute of descents, now as heretofore, takes it as she thus leaves it, and vests her entire interest in her heirs-at-law. At that moment the husband has nothing, and at that moment he never, by the common law or by the statutes of this State, acquired any new estate not vested in him at a prior period. It can only be by the mere invention of a new species of estate, never before known, that the husband can now be allowed to deprive the wife's heirs of their lawful inheritance, and appropriate it to himself, or rather, as would oftener happen, to sacrifice it to the demands of his creditors. There is not much in the origin or characteristics of this species of estate which should induce the courts to struggle for its preservation.

The statutes which affect the question of its continuance ought to be interpreted somewhat in the spirit of the age which has demanded many like improvements in our laws concerning the condition of the wife and her rights of property.

Advancing civilization has rejected many cumbrous institutions of the past as useless. Where are now those ancient tenures of homage, fealty, escuage, knightservice, frank-almoign, grand-serjeantry, petit-serjeantry, burgage, villenage, and by the verge? Buried and forgotten, or only remembered as we remember there was a deluge. The feudal

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tenures are abolished. The time has come when this other effete relic of the feudal age, "the tenancy by the curtesy of England" is summoned to the dusty receptacle of its kindred. The abolition of this most anomalous and peculiar of those tenures, "whereby lands and tenements be holden," would serve as an additional land mark to indicate a true and substantial progress.

If tenancy by the curtesy *initiate* is destroyed, which is a proposition too plain to be controverted, how can curtesy now have any origin? Certainly, it is not within the province of the courts to manufacture new estates; that would be an act of pure legislation.

Tenancy *initiate*, and tenancy *consummate*, is one and the same estate. They cannot be separated so that one man can be vested with the husband's interest as tenant by the curtesy *initiate*, and another man with the husband's interest as tenant by the curtesy *consummate*.

Take the case of a conveyance by the husband himself, of his right by the curtesy *initiate* to a purchaser of that interest while the wife is living, or the case of a judicial sale of the same interest by a judgment creditor upon execution; afterward the wife dies; will it be pretended that the husband in such a case, gets by her death a particle of interest in her estate? That such purchaser owns the husband's estate as tenant by the curtesy *initiate*, and that the husband himself owns another interest as tenant by the curtesy *consummate*? If curtesy *initiate* and curtesy *consummate* are different estates, they may be vested in different owners, but their possible separation strikes the legal mind as an absurdity.

The first section of the act of 1848, is in terms prospective in its operation. The second section, in terms, applies to the property of any female already married when the act was passed. Both sections alike purported to exclude the rights of the husband. It was held in *Westervelt v. Gregg*, that the second section was unconstitutional, because it attempted to take away the already vested interest of the husband. But

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the effect of the language of the second section, aside from the constitutional difficulty, is precisely the same as to abrogating the husband's vested estate, as is the language of the first section in abrogating the husband's interest in future cases. In the case before cited, the Court of Appeals declared that the second section, if valid, excluded the husband's interest after the wife's death. "Had it, therefore, been competent," say the court, "for the legislature to enact a law thus affecting existing rights of property, the plaintiff would thereby certainly have been divested of any interest in the personal property of his wife; and the right of reducing her choses in action into possession, or assigning or disposing of them for his own use, *or of enjoying them in the event of her death*, would have been taken away." (24 N. Y. R., 375.) And, further, the court add: "In the event of the wife's death, the husband does not take the choses in action not then reduced to his possession as next of kin, or under any statute of distributions; *but the property is already vested in him*, insomuch, that should he die before recovering them, they would be assets of his estate, to be recovered by his representatives, and not by the representatives of his wife" (p. 377).

If, then, the second section of the act of 1848 is so comprehensive that it would, if valid, take away from the husband his right of enjoying the wife's choses in action and personal property, in the event of her death, then, manifestly, the first section, being valid, does operate to that extent. This would prevent the husband from ever enjoying the deceased wife's personal property, as well after as before her decease, and such unquestionably would be the effect of that statute standing by itself.

But the provisions of the Revised Statutes protecting the husband's right to such personalty were left unrepealed in 1848-9, and they alone saved his interest. Now these are also repealed by the law of 1867, and the husband comes in under the present law merely to share in the wife's personal estate after her death, as the widow shares in the personal estate of her deceased husband.

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I concur in the opinion expressed in *Hurd v. Cass*, that the acts of 1848-9, *did not* affect the laws of descent that governed the wife's real estate; but I dispute the proposition that the husband's curtesy was ever taken by descent. By the statute of descents as well before as after 1848, all the wife's interest descended to her heirs. Prior to 1848 that interest was liable to be abridged or diminished in her realty by the birth of issue, which had precisely the same effect as though she had granted to another person a lease for the term of the lessee's life; so that, dying, she had so much less of interest to descend to her heirs. Now she retains her whole interest till her death, notwithstanding her marriage and the birth of children. She now leaves a larger interest, but such interest as she has, more or less, in real property, goes to her heirs-at-law as it did before.

I must therefore, hold in this matter that the infant petitioner, Frances M. Winne, is sole owner of all the real estate proposed to be sold, and that her father has no interest in it. The proceeds of the sale must be paid or secured for the petitioner's benefit and an order entered accordingly.

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1. The auditor of the canal department is not authorized by law to direct in his warrant, drawn upon the treasurer, the particular bank having on deposit money belonging to the canal fund, upon which the check in payment of the warrant shall be drawn by the treasurer. *The People v. Bristol.* 45
2. The treasurer of the State has the custody and control of the canal fund, subject only to such power over the same as is by law vested in the commissioners of the canal fund, and has, therefore, the right to determine from which depository the money shall be drawn to satisfy any such warrant. Per INGALLS, J. *Id.*
3. And it seems that the authority of the commissioners to direct the treasurer in this particular may be more satisfactorily inferred from the general powers conferred by law upon them, than such authority in the auditor can be inferred from the nature of his office, and the duties which by law devolve upon him. *Id.*
4. The commissioners of the canal fund having passed a resolution that the treasurer might, in his discretion, draw the check in payment of any warrant drawn by the auditor, upon any bank in the city of Albany having on deposit money applicable to the payment of the claim; and the auditor having drawn a warrant in favor

of the relator, directing the treasurer to pay by check on the Mechanics' and Farmers' Bank, and the treasurer having drawn the check in payment of the warrant on the Merchants' National Bank, the auditor refused to countersign the same because it was not drawn on the bank specified in the warrant.—*Held*, on appeal from an order at Special Term, directing a mandamus to issue requiring the treasurer to draw the check as required by the warrant, that the treasurer, and not the auditor, had the right to select the bank on which the check should be drawn, and that the order appealed from should be reversed. *Id.*

CANALS.

See CANAL FUND, 1 to 4 inclusive.
SUPERINTENDENT OF CANAL
REPAIRS, 1, 2, 3.

CARRIER.

See COMMON CARRIER.

CASES DOUBTED, APPROVED, AND EXPLAINED.

Adams v. Fort Plain Bank (36 N. Y., 255), distinguished. 55
Bishop v. Bishop (1 Kern., 128), explained and distinguished. 219
Briggs v. Briggs (20 Barb., 477), explained. 488
Goulding v. Davidson (26 N. Y., 604), distinguished. 101
Grant v. Morse (22 N. Y., 323), suggestions in, doubted. 20
Livingston v. Gibbons (4 John. Ch., 94), explained. 494
Murdock v. Chenango Mut. Ins. Co. (2 Coms., 210), explained. 20
Norton v. Hayes (4 Denio, 245), explained. 494
Parsons v. Nash (8 How. R., 454), explained. 488
People v. Bennett (6 Abb., 343), upon a certain point approved. 66
People v. Fields (52 Barb., 198), approved in part. 222
Pilling v. Pilling (45 Barb., 86), reviewed. 150

Shubart v. Harteau (34 Barb., 447), suggestions in, disapproved. 488
Smith v. Floyd (18 Barb., 522), distinguished. 82
Tillou v. Kingston Mut. Ins. Co. (1 Seld., 405), explained. 20
Vandervoort v. Palmer (4 Duer, 677), explained. 494
Worrall v. Munn (1 Seld., 229). Remarks, disapproved. 207
Wheeler v. Anthony (10 Wend., 346), distinguished. 464

CERTIORARI.

See EQUALIZATION OF ASSESSMENTS.

COMMON CARRIERS.

See TELEGRAPH COMPANIES, 1 to 5 inclusive.
EVIDENCE, 12.

COMPARISON OF WRITINGS.

See EVIDENCE, 11.

COMPLAINT.

See DISCRETION, 1.
SUMMONS, 4.
TELEGRAPH COMPANIES, 9.
FORCIBLE ENTRY AND DETAINER, 1, 10.
PRACTICE, 16, 17.

COMPTROLLER.

1. On an appeal, by the supervisors of the town of Watertown (under § 18, Laws 1859, chap. 312), from the decisions of the supervisors of Jefferson county, in the equalization of assessments, the comptroller made his determination, upon proofs taken before a referee, appointed by him for the purpose,—*Held*, the statute gave him authority to do so. *People v. Hillhouse*. 87

See MANDAMUS, 1.

CONSIDERATION.

See GRANTEE, 1, 2.
VENDOR AND PURCHASER OF
LANDS, 1, 2.
MARRIED WOMAN, 5, 6.

CONSIGNOR AND CONSIGNEE.

1. The original shipper of goods, upon a boat or vessel, for transportation under the ordinary bill of lading, or its equivalent, remains liable to the master for freight money earned, although the latter delivers the consignment without exacting payment for carriage, of the consignee; and this is so, although the consignee offers to pay the freight, which the master refuses to receive. *Gilson v. Madden*. 172

2. M. shipped goods to W., the bill of lading contained a marginal memorandum, "Ac. H. & Co."—*Held*, M. must nevertheless be deemed the consignor. *Id.*

See BILL OF LADING, 1.
EVIDENCE, 12.

CONSPIRACY.

See ELECTION OF DIRECTORS, 7.
EVIDENCE, 17.

CONSTITUTIONAL LAW.

See LEGISLATIVE POWER.

CONSTRUCTION OF WRITTEN INSTRUMENTS.

See ARBITRATION AND AWARD, 1, 2.
BILL OF LADING, 1.
CONSIGNOR AND CONSIGNEE, 2.
CONTRACT, 4, 6.
DEVISE AND DEVISEE, 1, 2.
GUARANTY, 1, 2, 3.
MORTGAGE OF CHATTELS, 5, 6.
PRINCIPAL AND AGENT, 1.

PARTNERSHIP, 2, 3.
VENDOR AND PURCHASER OF
LANDS, 8, 9.
WILL, 1 to 16.

CONTRACT.

1. A party is under no obligation to protect himself against the consequences of a breach of contract until it occurs. Until then, the contract is his protection. *Baldwin v. U. S. Telegraph Co.* 125
2. Irrespective of the statute of frauds, a party who has not signed a written agreement, is not bound by it. *Gage v. Jaqueth*. 207
3. The remarks in *Worrall v. Munn* (1 Seld., 229), to the contrary, disapproved. *Id.*
4. A contract with a railroad company for the performance of labor, &c., upon its road, in the construction thereof, by which the contractor agrees to abide by the opinion of an engineer in such company's employ, as to the adequacy of his labors to accomplish the contract work within a specified time, and upon notice from such engineer, that he will make the exertions and arrangements, necessary in the latter's opinion, to compensate for previous neglect and to insure fulfillment, as stipulated; and for failure so to do that the contract shall, at the option of the company, be at an end, and that he will be liable for damages or expenses incurred on account of his neglect, and will surrender possession of the road, &c.; and, also, further providing that in case of failure to fulfill, he will forfeit, as a penalty, a percentage of the price of services, &c., rendered, to be retained by the company from amounts becoming due for such services, &c., until completion of the contract; and that no sums due over and above such percentage shall be paid until completion of the contract, and that such sums shall be appropriated to expenses incurred, if any, by the company, in obtaining completion of the contract beyond the expense pro

vided for therein; although it is to be very liberally construed as severe and highly penal, will if fairly made be fairly enforced. *Phelan v. The Albany and Susquehanna R. R. Co.* 258

5. So held in an action upon the contract for the price of services, &c., earned by the plaintiffs as assignees of the original contractors. *Id.*

6. The contract to marry is not, it seems, embraced in a statute referring to contracts in general. *Barnes v. Buck.* 268

See BOARDING-HOUSEKEEPER, 1.
CONSIGNOR AND CONSIGNEE, 1, 2.
COUNTERCLAIM, 6, 7.
EVIDENCE, 1, 2, 18.
GUARANTY, 1, 2, 8.
GUARDIAN, 2, 8.
INNKEEPER, 1 to 4 inclusive.
MARRIED WOMEN, 1 to 7 inclusive.
MORTGAGE OF CHATTELS, 8.
PRINCIPAL AND AGENT, 1 to 5 inclusive.
PROMISE, 1, 2.
REAL PARTY IN INTEREST, 1.
TELEGRAPH COMPANIES, 1, 3, 4 to 8 inclusive.
STATUTE OF FRAUDS, 1 to 4 inclusive.

CONTRACTOR.

1. To charge a railroad corporation with liability for the indebtedness of a contractor to his laborers, under § 12 of the general railroad act (Laws 1850, chap. 140), the indebtedness must arise from services personally performed by the laborers. *Cummings v. New York and Oswego Mid. R. R. Co.* 68

2. Accordingly, where an action was brought against a railroad company, in the manner provided by that section, to recover for the services of plaintiff's servant and team, rendered upon the defendant's road, for a contractor constructing a portion thereof, the claim was disallowed. *Id.*

See CONTRACT, 4.

CONTRIBUTION.

1. A stockholder, who has been compelled to pay the debt of his corporation, may have an action for contribution against the remaining stockholders who were originally liable with him for the same. *Aspinwall v. Torrance.* 381

2. So held, where the stockholder had been charged under the provisions of the "Act for the incorporation of companies formed to navigate the ocean by steamships" (Laws of 1852, chap. 228, p. 302), which, in certain events, impose upon the stockholders a several liability for the corporate debts. *Id.*

3. The equitable doctrine of contribution explained and enforced. *Id.*

See STOCKHOLDERS, 2.

CORPORATION.

1. The right of *de facto* directors of a corporation, to act as directors, cannot be questioned collaterally in an action, to try the title of their appointee, to his office. Per J. C. SMITH, J. *People v. Hills.* 203

See CONTRIBUTION, 1, 2.

ELECTION OF DIRECTORS, 1 to 7 inclusive.

PRACTICE, 12.

PRINCIPAL AND AGENT, 1, 2.

RAILROAD COMPANIES, 1, 2.

STOCKHOLDERS, 1.

COSTS AND COUNSEL FEES.

1. An allowance made by a surrogate for costs and counsel fees on an accounting, is not conclusive in an action by the attorney to recover for his services and disbursements. *Mygatt v. Willcox.* 55

2. In such action there is no distinction, as regards interest, between charges for disbursements and for services; in neither case can inter-

est be charged, by way of penalty for a default, until a demand has been made, or the account is liquidated between the parties, or the debt has become due by the termination of the employment. *Id.*

See EXECUTORS and ADMINISTRATORS, 1 to 6 inclusive.

COUNTER-CLAIM.

1. The complaint averred, that under a contract between the plaintiff and defendant, the latter had received a sum of money, two-thirds of which belonged to the plaintiff, and the balance to the defendant, and claimed the two-thirds; the answer pleaded the statute of limitations, denied the alleged receipt of the money, averred to the contrary, that plaintiff had received it under the contract, and demanded judgment for the one-third.—*Held*, plaintiff could not, without pleading it in reply, avail himself of the statute of limitations in bar of defendant's claim to the one-third. *Clinton v. Eddy.* 61

2. The defendant's averment of indebtedness by plaintiff, was a statement of new matter constituting a counter-claim. *Id.*

3. The term counter-claim, as used by the Code, comprehends recoupment and set-off. Per BOARDMAN, J. *Id.*

4. Section 64 of the Code, permits a counter-claim in a Justices' Court, of the same nature, as the counter-claim allowed in actions in this court. *Williams v. Bitner.* 200

5. And a defendant may recover upon a counter-claim in that court, to an amount not exceeding \$200, over and beyond extinguishing the plaintiff's claim. *Id.*

6. In an action brought by a member of a partnership firm, on a promissory note, given to him with the firm's consent, on a loan of firm money, with reference to a firm transaction,—*Held*, that defen-

dant could not set up a counter-claim for damages, existing in his favor, against the firm, and arising out of the contract, with reference to which, the loan for which the note was given, was made. *Myn-ders v. Snook.* 488

7. The suggestion to the contrary in *Schubart v. Harteau* (34 Barb., 447), held to be *obiter*, and *Briggs v. Briggs* (20 Barb., 477), upon which the same is based, commented upon, and the latter case, and *Parsons v. Nash* (8 How. Pr. R., 454), explained. *Id.*

COUNTY CLERK.

See JUDGMENTS AND EXECUTIONS, 1 to 5 inclusive.

COUNTY COURT.

1. A sale of infant's real property having been made and completed, under proceedings before a County Court, a subsequent order of the same court, directing the special guardian to invest the proceeds, in land outside the county over which its jurisdiction extends, the infant and special guardian being at the time resident in the county where such land is located, is a nullity. *Stiles v. Beeman.* 90

2. Whether proceeds of a judicial sale of infant's real property, remaining in the hands of the special guardian, can be regarded as land, under 2 R. S., 195, § 180, in such sense as to give a County Court power to direct the disposition thereof. *Quere.* *Id.*

3. The power of County Courts, under § 30, sub. 6, of the Code, for sale, etc., of an infant's real estate, includes all incidental powers and the use of means necessary to complete the sale, by transferring the infant's title, and securing to him the avails of his interest in his estate. Per JOHNSON, J. *Id.*

4. But whatever is done in this respect, must be done when the par-

ties and subject-matter are before the court, and as part of the proceedings to sell, etc. The security then deemed necessary, if given, or investment ordered, if made, is the judgment of the court; its powers are exhausted thereby, and its jurisdiction over the parties and subject-matter is at an end. *Id.*

5. Rule 69 of this court refers to proceedings at the time of sale. *Id.*

6. At least, it can control County Courts, only as so applicable; it cannot enlarge their statutory powers. *Id.*

7. The powers conferred by 2 R. S., 195, § 179, upon the Court of Chancery, through which the infant is made a ward of that court, from the time of the application, for the purposes enumerated in the statute, have not been expressly given to the County Courts, and cannot be implied from mere power to sell infants' lands. *Id.*

COURT OF A JUSTICE OF THE PEACE

1. Proceedings in Justices' Courts are to be liberally reviewed, and the judgments therein will be sustained unless manifestly erroneous. *McNall v. McClure.* 82

See COUNTER-CLAIM, 4, 5.
JUDGMENTS AND EXECUTIONS, 1, 2.

COVENANT.

1. It is, it seems, the tendency of courts governed by the rules of the common law, to favor and facilitate remedies on covenants of title, and to moderate the ancient rule, which is, in many cases, severe and unjust to the purchaser. *Bordenwell v. Colie.* 141

See NUISANCE, 6, 7.
SALE OF CHATTELS, 1 to 5.

CREDITOR.

See GRANTEE, 1, 2.

CRIMINAL LAW.

See WITNESS, 1, 2, 8.

DAMAGES.

1. The liability of defendant as a hotel-keeper, for coin left in his possession by the plaintiff, being established, — *Held*, plaintiff was entitled to recover the market value thereof in currency. *Kellogg v. Sweeney.* 397

See CONTRACT, 1.
COUNTERCLAIM, 6, 7.
MASTER AND SERVANT, 1, 2, 8.
TELEGRAPH COMPANIES, 8.

DELIVERY OF INSTRUMENTS.

See ARBITRATION AND AWARD, 1, 2.
STAMP, 1.

DEMAND.

See ARBITRATION AND AWARD, 2.
MORTGAGE OF CHATTELS, 5.

DEMURRER.

1. A defendant cannot avail himself at the trial, of defenses to which demurrers have been interposed and sustained. *Baldwin v. U. S. Telegraph Co.* 125

See PRACTICE, 16.

DESTRUCTION OF PROPERTY.

See SUPERINTENDENT OF CANALS, 1, 2, 8.

DEVISE AND DEVISEE.

1. A testator mortgaged his individual real estate, to secure the payment of the notes of his firm, and died before their payment, having devised the mortgaged property, without express direction in his will for payment of the mortgage. *Held*, the firm assets were primarily liable to satisfy the mortgage. *Robinson v. Robinson.* 117
2. And it seems the devisee would (under § 4, 1 R. S., 749), be chargeable with payment of the mortgage to the extent of any deficiency of the firm assets for that purpose. *Id.*
3. And such firm assets, which were sufficient to meet the firm liabilities, including the notes, having come into the hands of his executors through the testator, to whom they came as surviving partner.—*Held*, the executors were equitable trustees to pay the partnership debts, and distribute the surplus; and the devisee, being plaintiff in an action for the purpose against them and other necessary parties, was entitled to judgment for satisfaction of the mortgage out of the partnership funds. *Id.*

DIRECTORS.

See CORPORATION, 1.
RAILROAD COMPANIES, 1, 2.

DISCRETION.

1. Upon the trial of an action of ejectment, defendant moved, after a jury had been impaneled, to dismiss the complaint, as containing no description of any land. The motion was refused, and he excepted; later in the trial, and after an accurate description of the premises claimed had been given in evidence, the court allowed the plaintiff to amend by inserting such description in his complaint.—*Held*, that conceding the description to have been origi-

nally uncertain and defective (under 2 R. S., 804, § 8), the court was at liberty to proceed with the trial, and the allowance of the amendment was an exercise of judicial discretion not subject to review. *Olendorf v. Cook.* 37

See TRIAL, 1.

DIVISION FENCES.

1. Plaintiff and defendant owned and occupied contiguous premises, facing a highway; defendant drove a post, partly on the plaintiff's land, at the point where their front fences came together, claiming the right to maintain it there, as part of his front fence. In an action by plaintiff, to recover damages for trespass, on account thereof—*Held*, the jury were rightly instructed that the post was not part of a division fence. *Warren v. Sabin.* 79
2. The rule as to division fences permits them to be placed equally on the land of each adjoining owner. *Id.*
3. It has its foundation wholly in the statute, and does not apply to fences meeting on the front of adjoining premises. Such fences are required to terminate at the division line. *Id.*

DOCKET OF JUDGMENT.

See JUDGMENTS AND EXECUTIONS, 1 to 5 inclusive.

DOWER.

See WILL, 16.
MARRIED WOMEN, 6.

EJECTMENT.

See LEASE, 1.
 NEW TRIAL, 5.
 PRACTICE, 3, 6.
 TAXES AND ASSESSMENTS, 2.

ELECTION OF DIRECTORS.

1. It being provided by the by-laws, and stated in the notice of the annual meeting for the election of directors of a railroad company, that the polls would be opened at twelve and continue open until one o'clock, the fact that the poll was not open until after twelve o'clock, and continued open until after one o'clock does not invalidate the election. *People v. Albany & Susquehanna R. R. Co.* 808
2. Surprise and fraud upon a part of the electors is ground for avoiding an election, and all acts done by portions of the corporators, which bear the appearance of trick, secrecy, or fraud, will be held invalid. *Id.*
3. Accordingly, if a portion of the stockholders meet and organize before the hour named in the by-laws, and notice for the annual meeting, and afterward, when the hour actually arrives, without any actual change in the organization, pass resolutions previously prepared, that the meeting proceed with the election of directors, with the same chairman and secretary, and also that the annual election of directors and inspectors proceed, with the inspectors first chosen, the organization of the first meeting is obviously a surprise and fraud upon many of the stockholders entitled to attend and take part in it; and the reorganized meeting in fact and in legal effect, but a continuance of the first meeting, and irregular and void as against such stockholders as do not participate in it; and such meeting as to its effect on the validity of another meeting duly organized soon after the proper hour, must be regarded in law as if it had never been held. *Id.*
4. The service on inspectors of election, chosen at the last annual meeting, of an injunction restraining them from acting, and the service of an order of arrest, on the president of a railroad company within half an hour of the time fixed for the annual meeting,—*Held*, under the circumstances, an obvious and designed surprise upon the great body of stockholders of the corporation, and intended to hinder and embarrass them. *Id.*
5. The pre-occupation of the director's room, before the hour fixed for an election, by a large number of persons specially imported for the purpose and furnished with proxies, that they might participate in the stockholders' meeting and in the election,—*Held*, a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of *bona fide* stockholders. *Id.*
6. It seems that an election held in distinct violation of a valid injunction duly served, would be set aside on a summary application to the court, pursuant to § 5, title 4, chap. 8, first part of the Revised Statutes. *Id.*
7. The choice of a certain set of directors, procured through a pre-conceived scheme, combination or conspiracy, to carry their election by the use and abuse of legal process and proceedings, and by efforts and contrivances to prevent a fair election of inspectors, adjudged invalid; and another set of directors, chosen at another meeting of the stockholders, held at the same time and place, held to be duly elected. *Id.*

EMPLOYEE.

See MASTER AND SERVANT, 1, 2, 3

ENCROACHMENT.

See NUISANCE, 1 to 5.

EQUALIZATION OF ASSESSMENTS.

1. The comptroller's decision upon an appeal by supervisors (under § 18, Laws 1859, chap. 312), having been brought into this court for review upon a common law *certiorari*, it appeared from the return that he had united the personal and real estate, and thus had allowed the deduction of too large a sum from the amount assessed on the town by the county supervisors; the court corrected the comptroller's error, and modified his determination accordingly. *People v. Hillhouse.* 87

See COMPTROLLER, 1.

EQUITIES.

See PARTNERSHIP, 3.

ESTOPPEL.

1. Upon the trial of an action to recover damages for continuing a nuisance, the plaintiff gave in evidence the judgment roll of a judgment in his favor, against the defendant, which was shown to have been rendered upon the allegation and proof, that defendant had caused the nuisance by erecting an embankment on his own premises.—*Held*, defendant was not precluded from showing, that he had parted with the possession and ownership of the premises, previously to the commencement of the action in which such judgment had been rendered. *Hanes v. Cowing.* 288
2. A defendant adjudged in an action against him to be the owner of stock, is not estopped by the judgment from denying his ownership in an action against him by another plaintiff. *Aspinwall v. Torrance.* 881
3. And it seems a judgment from which an appeal is pending is not a final judgment by which the

parties are prevented from disputing the facts adjudged therein. *Id.*

See PARTNERSHIP, 1.

EVIDENCE.

1. The complaint averred a contract with I., as the defendants' agent; I. verified the answer, and recited in the affidavit of verification his agency for the defendants in making the contract.—*Held*, the affidavit was inadmissible as evidence of I.'s agency in making the contract. *Bowen v. Powell.* 1
2. The defendants did not, by obtaining a standing in court, through I.'s verification, become bound by the recitals in the affidavit, as having been authorized or adopted by them. *Id.*
3. When the entire damages, claimed to have resulted from the negligent performance of specific services, are sought to be inferred, and estimated, from proof of negligence, and of its nature and extent, in respect to a part of the services, the inference and estimate must be made by the jury. *Hollis v. Wagar.* 4
4. Accordingly, a witness having testified, that he had re-dug a part of a field of potatoes, which had been dug by plaintiff on contract, and had found a certain quantity of potatoes still in it; and the dimensions of the field being given, was asked how many bushels of potatoes had, in his judgment, been left in the ground by plaintiff.—*Held*, that the question, assuming a test of damages, and calling for the opinion of the witness, was properly overruled. *Id.*
5. Whether a written statement of items made by the witness, and verified by his oath on the stand, and which he is ready to verify orally in detail, is not admissible in evidence in the first instance as an account—*Quere.* *Francis v. McElhone.* 7

6. In an action to recover the proceeds of sales made by defendant, as agent for the plaintiffs, the defendant having testified to the collection of different amounts for the plaintiffs, and to a settlement at which he paid them a specific sum, is entitled to the benefit of his own testimony as to the completeness of the accounting, and may be asked the general question whether or not he accounted for all the moneys collected for them. *Id.*
7. And when such defendant, as a witness, states that he had made deductions from claims collected by him, and was authorized to do so if he thought necessary, and that on his settlement with plaintiffs he was asked by one of them if certain deductions made were necessary in order to collect the claims, and, upon his answering affirmatively, the deductions were allowed, he may, in order to establish the fairness of his transactions, be asked if the deductions made by him, were in fact necessary in order to collect the claims in question. *Id.*
8. He may also, in the first instance, show the total amount allowed him in settlements made with one of the plaintiffs, for time and expenses, such allowance, was an admission by plaintiffs of the correctness of the charges, to the benefit of which defendant was entitled. And the error in excluding the testimony will not be disregarded on appeal, because, on his cross-examination, the witness could not state particularly what took place at the settlements. *Id.*
9. In an action against B., the mortgagee, and the administrators of S., to set aside a mortgage from S., as without consideration and in fraud of plaintiff, who claimed to be a creditor and subsequent purchaser, B., testified, as a witness for plaintiff, that her mortgage was upon consideration of the surrender of notes given to her by S., for services rendered to him, and also other indebtedness of S. to her. Plaintiff then offered to show, by other witnesses, that the notes were gratuitous; that the services were never rendered, and no relation of employer and employee ever existed between S. and B.; also, that the notes and mortgages were given for an illegal consideration.—*Held*, the evidence was properly excluded, as tending to impeach plaintiff's own witness. *Shadbolt v. Bassett*. 121
10. On the trial of an issue to determine whether an alleged testator's signature is genuine or simulated, it seems that his declaration, made before the date of the alleged will, that he intended to give his property to the legatees therein named; and his declaration made after that date, that he had made such will, are inadmissible as evidence to sustain the genuineness of the signature. *Johnson v. Hicks*. 150
11. The rule excluding the opinion of experts, whether a signature is genuine or simulated, formed by comparing it with other writings, not in evidence in the cause or admitted to be genuine, stated and applied in this case. *Id.*
12. In an action brought against a carrier by a consignee to recover damages for injury to goods while *in transitu*, the plaintiff gave in evidence a writing in the usual form of a bill of lading, signed by the consignor only, by which it appeared that the defendant had received the goods for transportation, subject to the ordinary liabilities of a common carrier.—*Held*, defendant might show in defence a contract to carry, subject to the owner's risk. *Gage v. Jaqueth*. 207
13. A written instrument, adopted by parties as containing a contract between them, but not mutually signed, is not conclusive evidence of such contract. *Id.*
14. A mortgagee of chattels, under a mortgage containing a clause which gave him power in case he deemed "himself unsafe," to take possession of the mortgaged property, and sell the same at public or private sale, took possession under such clause, advertised and sold the said property, without demand, or personal notice of sale to the

mortgagor, and brought an action for a balance due upon the mortgage, after applying the proceeds. It was *held*, that the mortgage was properly received, at the trial, as evidence of the claim thereon. *Huggans v. Fryer.* 276

15. Also, there being no proof of fraud in the sale, and the question being put to the plaintiff, as a witness, without intending to establish fraud, whether the purchaser paid him any money thereon, that such question was properly excluded, as well as testimony upon the value of the property. *Id.*

16. *Held*, also, plaintiff might show that the sale was fairly made, and that plaintiff's testimony was competent upon the question whether he "deemed himself unsafe" to allow the property to remain in defendant's possession. *Id.*

17. The *ex parte* appointment in a certain action of a receiver, who obtained possession of certain scrip and voted on it, and the *ex parte* appointment in another action, of interested parties as receivers of the books and papers and property of a railroad,—*Held*, evidence that the suits were instituted and the orders applied for with a fraudulent design to aid the election of a certain set of directors. *People v. Albany and Susquehanna R. R. Co.* 308

See ESTOPPEL, 1.
FORCIBLE ENTRY AND DETAINER, 2, 4.
INSURANCE, 2.
MASTER AND SERVANT, 4.
MORTGAGE OF CHATTELS, 2, 3.
NEW TRIAL, 1, 4.
STAMP, 1.
STATUTE OF FRAUDS, 1.
TELEGRAPH COMPANIES, 9.
WITNESS, 1, 2, 3.

EXCEPTION.

See PRACTICE, 5.

EXCEPTIONS AND RESERVATIONS IN DEEDS.

See VENDOR AND PURCHASER OF LANDS, 8, 9.

EXECUTORS AND ADMINISTRATORS.

1. The liability of an administrator for the fees of counsel employed by him on an accounting is personal. *Mygatt v. Willcox.* 55

2. Executors and administrators suing in their representative character, *unnecessarily*, in cases where the cause of action (if any) accrues to them in their individual right, and, failing to recover, are personally liable to the defendant for costs. *Holdrige v. Scott.* 308

3. Where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action vests in the executor or administrator in his private right, and he cannot in such case escape the penalty of costs by suing in form, in his representative capacity, *unnecessarily*, if he fails to obtain judgment. *Id.*

4. Where the record shows the action to be maintainable (if at all) in the individual right, no motion is necessary to charge such plaintiff with costs; judgment therefor may be entered, of course, as in ordinary cases, upon the clerk's taxation. *Id.*

5. Section 317 of the Code has not changed the former law of personal liability of executors and administrators plaintiffs, for costs, in actions *unnecessarily* brought by them in their representative capacity where they might have sued in their individual right, and judgment passes against them. *Id.*

6. The case of *Woodruff*, administrator, v. *Cook* (14 How., 481), considered to be an erroneous construction of the Code upon this subject. *Id.*

7. One of the testator's daughters being deceased intestate, having died after the testator, and while a resident of Connecticut, and leaving a husband and children surviving her; and said husband having obtained letters of administration in New York, and being a party to actions for construction of the will, &c., before the court for determination, and plaintiff in one of said actions, and it appearing, that by the law of Connecticut, he was entitled to a life estate only in the personal estate of his deceased wife, and her children, who were minors, to the remainder.—*Held*, security should be required of him before such estate should be placed in his hands. *Manice v. Manice*. 348
8. An administratrix caused a notice to be published, under an order obtained from the surrogate for the purpose, requiring creditors to present their claims against her intestate's estate, to her attorney. Plaintiff presented his account accordingly, and left it with the attorney, and no objection was made thereto until more than three years after such presentation, when it was rejected by the administratrix; afterward, and when ten years from the time the last item of the account accrued, had elapsed, an order was entered by the surrogate on consent of parties, under the statute, referring the claim to referees for adjudication, and on the hearing before such referee, the administratrix insisted upon the statute of limitations as a bar to a recovery; the referees found for the plaintiff.—*Held*, on appeal, their decision should be reversed. *Bucklin v. Chapin*. 443
9. A reference under the statute (2 R. S., 88, § 36), stands in place of an action, and the entry of an order to refer must be deemed its commencement, for the purpose of determining whether it has been brought within the time limited by the statute. *Id.*

See ACCOUNT, 1.

ACCOUNT STATED, 1, 2.

DEVISE AND DEVISEE, 3.

JOINT LIABILITY, 1.

STATUTE OF LIMITATIONS, 2.

EXPERTS AND OPINIONS

See EVIDENCE, 11.

FIXTURES.

1. Unattached scantling, which had been used to hang tobacco on to cure, in a barn, built on a farm where tobacco had been raised, which were put up and taken down, as they were, or were not wanted for the drying of the tobacco; and at the time of the sale were partly piled up in the barn, and partly used as a scaffolding for straw; no tobacco having been raised on the farm for a year or two previously.—*Held*, not to pass as fixtures by a conveyance of the farm. *Noyes v. Terry*. 219
2. In determining what will pass as fixtures by a deed conveying the freehold, the distinction between things actually annexed, and things totally disconnected, is one of the most easy and certain application, and should be maintained, except where the exigencies of trade, or long established usage, or precise authority has established an exception. *Id.*
3. The case of *Bishop v. Bishop* (1 Kern., 123), explained and distinguished. *Id.*

See GUARDIAN, 4.

FORCIBLE ENTRY AND DETAINER.

1. Where the complaint in proceedings for a forcible entry and detainer is defective, for omitting to set out the nature of the complainant's title or interest in the premises, and the objection is properly taken before the county judge and overruled, the defendant, after the proceedings are brought into this court by certiorari, should renew the objection before he traverses the inquisition. *After verdict* for the relator upon such defective complaint, it is too late to make the objection, but the verdict will be sustained if the facts proved on the trial are such as entitle the re-

- lator to the protection of the statute. *People v. Fields.* 222
2. It is competent for the defendant, in these proceedings, to disprove the facts relied upon by the complainant to establish his possession. *Id.*
3. The inquisition found the defendant guilty of both a forcible entry and detainer. On the trial of the traverse, the petit jury found the defendant *not guilty* of a forcible entry, but guilty of a forcible detainer. It seems the verdict, if right upon the merits, may be sustained as to form. *Id.*
4. Upon a former trial, the relator was nonsuited, and this court granted a new trial. (See 52 Barb., 198.) The doctrine of that case is approved, as far as it holds that *naked possession* or *occupation* is sufficient evidence of title to enable the occupant to maintain these proceedings against a stranger without title. *Id.*
5. Upon the last trial it was proved, or evidence was offered and rejected tending to prove, that the shop of the relator originally belonged to one Fish; that Fish obtained permission of the owner of the land to put it upon the lot on part of which it stood, without the payment of rent or other compensation, where it was to remain until the owner should require it to be removed; that the defendant afterward purchased the lot, and, with the consent of Fish, commenced excavating, for the purpose of erecting a block of stores; that Fish agreed to move off the shop, and was making preparation to do so, when the relator purchased it of Fish, and claimed a right to occupy the land on which it stood. The defendant then moved the shop into the public highway, and, by the verdict of the jury, was guilty of "*forcible detainer*" in keeping the relator out of possession. *Held*: (1). That if Fish was to be regarded as a tenant of the owner, it was strictly a tenancy at will at common law, and was terminated without notice to quit, by the very act of transfer, under color of which the relator acquired title to the shop. *Id.*
6. (2). That the defendant, having entered into possession of part of the premises, with the assent of Fish before the sale of the shop to the relator, must be deemed in the *constructive* possession of the whole; and that the relator, having attempted afterward to occupy the lot with his shop, was a mere intruder upon the possession of the defendant. *Id.*
7. (3). The jury, having negatived the charge of a *forcible entry* upon the premises by the defendant, there is no ground upon which the relator can claim *constructive possession*, so as to sustain the verdict for a *forcible detainer*, as against the owner in actual possession. *Id.*
8. And per MORGAN, J. To authorize proceedings for a *forcible detainer*, the entry must be an *unlawful* entry, followed by a *forcible* detainer. *Id.*
9. An entry by a person entitled to the possession is not unlawful, although made against the will of the party in possession; such person may enter peaceably upon the party in possession without right, by the very terms of the statute. *Id.*
10. To entitle the complainant to the protection of the statute, he must have at least a *right to the possession*. (2 R. S., 508, § 3.) And a complaint would be fatally defective if it alleged *possession* only, without alleging a *right to it*. *Id.*
11. A right of possession gained by *disseizin* is sufficient. So it seems, one who enters under a valid lease or contract of sale and who is holding over after his term has expired, or his contract has become forfeited, may be deemed still seized of his original estate, and entitled to the protection of the statute against a forcible entry upon his possession by the owner. *Id.*
12. But one, placed on the lands of another, without any terms prescribed or rent reserved, is not

within the protection of the statute; but is strictly a tenant at will at common law. An entry by the landlord, and a notice to quit, will terminate the tenancy, and revest the possession in the landlord, though the tenant be not actually turned out. *Id.*

18. A parol license to enter upon another's premises, to erect and maintain a house is revocable and confers no right whatever upon the licensee to occupy the premises after it is revoked. *Id.*

14. Such a license operates only as an excuse for the act, which would otherwise be a trespass, and confers neither possession nor right to possession as against the owner, within the meaning of the statute. *Id.*

See TENANT IN COMMON, 1 to 6.

FORMER SUIT.

See ESTOPPEL.

FRAUD.

See ELECTION OF DIRECTORS, 1, 2.
EVIDENCE, 7.
PARTNERSHIP, 7.

GENERAL RAILROAD LAWS.

1. Since the amendment, in 1854, to the general railroad law, which provides (§ 5), "that at every election of directors, the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it;" a party challenging votes is not entitled to a production of the books, although a prior by-law of the company authorizes him to demand it. *People v. Albany and Susquehanna R. R. Co.* 808
2. If such by-law were in full force, it would only be directory, and the omission to comply with it, and the disregard of the challenge,

would not invalidate an otherwise valid election; but would cast on the parties claiming under it, the burden of showing that the voters so challenged were, or appeared by the transfer books when closed, to be actually shareholders in the company for the number of shares so voted. *Id.*

GOODS SOLD.

See MARRIED WOMEN, 1, 2, 3.

GRANTEE.

1. S. executed to plaintiff, who was his creditor, a bond and mortgage, to secure an indebtedness, and plaintiff also recovered a judgment against him. S. then conveyed to plaintiff the mortgaged premises, in payment of his indebtedness to him, including that upon the bond and mortgage and judgment. — *Held*, plaintiff was neither a creditor of S., nor a purchaser for a valuable consideration, and not entitled, as such, to question the *bona fides* of a mortgage prior to own in time and record, given while S. was so indebted to him, and of which he had no actual knowledge, until after the conveyance to him. *Shadbolt v. Bassett.* 121
2. And he could not sustain an action for affirmative relief against a prior mortgage, on the ground of want of consideration for such mortgage. *Id.*

GUARANTY.

1. R., doing business as a retail dealer in furniture, obtained from C. a writing addressed to the plaintiff, who was a wholesale dealer in the same line, as follows: "There is a fair prospect that R. could sell a few chamber suits, if he had them; If you let him have them, we will

see that you receive pay for them as sold, or soon thereafter." In an action to recover the price of articles sold by plaintiff to R. on the faith thereof—*Held*, the guaranty contemplated but a single sale, and that accompanied or speedily followed by delivery; that it did not intend a continuing order for future delivery of goods from time to time for an indefinite period. *Hayden v. Crane*. 181

2. And, it seems, to construe such writing as covering such a continuing order, would give it the effect of a continuing guaranty. *Id.*

3. *Held*, further, that an action upon the guaranty could not be maintained for miscellaneous articles, constituent parts of "chamber suits," but out of which it did not appear that any such suit, as understood by the parties, could have been made; and although a custom of which R. had knowledge was shown, for the wholesale trade to sell retail dealers such separate articles, with a view to their arrangement afterward into such suits. *Id.*

GUARDIAN.

1. Section 20, 2 R. S., 158, by which a guardian is authorized to sustain and keep up the houses, &c., of his ward, does not include rebuilding. *Copley v. O'Neil*. 214

2. A guardian in socage cannot, by contract with himself, become a tenant of his ward's lands. *Id.*

3. Nor can he give to himself a license to erect and remove buildings thereon. *Id.*

4. And it seems, when a guardian erects a building, especially a dwelling on the ward's land, it becomes a permanent annexation, however attached to the soil. *Id.*

See COUNTY COURT, 1, 2.
INFANT, 1, 2.
LIEN, 1.

HANDWRITING.

See EVIDENCE, 10, 11.

HIGHWAY.

See NUISANCE, 1 to 6.

HOTEL-KEEPER.

See ACTION, 1, 2.

INN-KEEPER, 1, 2, 3, 4.

HUSBAND AND WIFE.

1. By the present laws of this State, the husband is not liable for the wrongful act of his wife, who, claiming a lien upon the personal property of a third person, refuses, on demand, to deliver it to such third person, who is the owner, where the wife claims such lien as her own separate property, although, in fact, she has no lien, and refusal amounts to a conversion. *Peak v. Lemon*. 295

2. And if the wife makes such refusal in the company or presence of her husband, the latter is not liable for such wrongful act of hers, nor is there any presumption that she is under the coercion, command, or direction of her husband, where she asserts her own claims in relation to her separate property. *Id.*

3. It is the nature and not the validity of the wife's claim, respecting her separate property, which is the test of her liability and of her husband's exemption. *Id.*

See MARRIED WOMEN, 1 to 7 inclusive
CONTRACT, 6.

IMPEACHMENT OF WITNESS.

See EVIDENCE, 9.

INABILITY TO PURCHASE.

See INFANT, 1, 2.

INDEMNITY.

See PROMISE, 1.

INFANT.

1. A special guardian, appointed on the judicial sale of a minor's real property, being liable for money received therefrom, conveyed to one of the sureties upon his bond, a farm, subject to a mortgage, upon trust, that the surety reimburse himself from the rents and profits, or proceeds thereof, for such sums as he might be required to pay by reason of liabilities of the latter, on the grantor's account. The farm was then conveyed by the surety to the minor, under agreement between them and the special guardian (who was insolvent), that it should satisfy the bond, and discharge the special guardian and his sureties from liability thereon. The mortgage being afterward foreclosed, the surety purchased at the foreclosure sale, and went into occupation; the minor, attaining his majority, elected to ratify the agreement and, deed pursuant thereto.—*Held*, the purchase by the surety was voidable by the minor, when he came of age. *Stiles v. Beeman*. 90
2. The ratification by the minor, at his majority, did not, by relation to the time of the conveyance, cut off his equitable right, to claim the purchase by the surety as made for his benefit. *Id.*

See COUNTY COURT, 1, 2, 3, 4, 7.
EXECUTORS AND ADMINISTRATORS, 7.

INJUNCTION.

See ELECTION OF DIRECTORS, 4, 6.

INNKEEPER.

1. A hotel-keeper who has received from his guest a satchel, such as is ordinarily used to contain clothing, and with no other information as to its contents, than that it contains property of value, cannot avoid liability for a loss of coin contained in the satchel, on the ground that the guest was negligent in placing it there. *Kellogg v. Sweeney*. 397
2. So held, where the guest was not charged with notice, to place valuables in a safe provided, according to Laws 1855, chap. 421. *Id.*
3. An innkeeper's liability is not limited to property of any particular kind or value; it embraces all the personal property of the guest brought to the inn. *Id.*
4. And it seems, there is no rule exempting an innkeeper from liability for money or jewelry, which have been left in the guest's room in his trunk, unless he brings home to the guest, notice that they must be delivered to him, or deposited in such place as he shall direct. Per MULLIN, J. *Id.*

See ACTION, 1, 2.
DAMAGES, 1.

INSURANCE.

1. M. having possession of lands, under a contract for their purchase from C., effected an insurance on the buildings thereupon, and, after they were in part destroyed by fire, directed the insurer to pay the loss to C., and at the same time assigned to C. the policy; the insurer refused to approve of the assignment, because it included the insurance upon the buildings destroyed; the assignment then being amended, by consent of parties, to meet the insurer's objection, the latter, reciting that C. had purchased the property, indorsed an approval.—*Held*, there was no breach of a condition not to assign without the insurer's approval. *Manley v. Insurance Company of N. America*. 20

2. It may be inferred, under such circumstances, that the assignment was made to take effect on the insurer's approval. *Id.*
3. An assignment so made does not violate a condition which requires that the consent of the insurer shall precede the assignment. *Id.*
4. A transfer by the assured of a portion of the thing insured, does not avoid the policy as to his remaining interest. *Id.*
5. The decisions in *Tillou v. The Kingston Mut. Ins. Co.* (1 Seld., 405), and *Murdock v. The Chenango Co. Mut. Ins. Co.* (2 Coms., 210), explained, and the difference in practice, in like cases, at the time of those decisions and under the Code, pointed out. Per MARVIN, J. *Id.*

INTEREST.

See COSTS AND COUNSEL FEES, 1, 2.

JOINT LIABILITY.

1. Plaintiff having acted for both defendants, as administrator of an estate, on an accounting before the surrogate and on appeal from the decree thereupon, and their management of the estate being the subject for consideration before the surrogate, they were "united in interest" (Code, § 119), and jointly liable for plaintiff's fees and disbursements. *Mygatt v. Willcox.* 55

JUDGE'S CHARGE.

See PARTNERSHIP, 5.

JUDGMENTS AND EXECUTIONS.

1. A judgment entered by a county clerk, on the transcript of a judg-

ment of a Justices' Court, must be docketed in the same manner as the judgments of a court of record. Per J. C. SMITH, J. *Blossom v. Barry.* 190

2. Section 63 of the Code, refers to and adopts, in this respect, the existing provisions of the Revised Statutes. *Id.*
3. Plaintiff obtained judgment in an action on contract, before a justice of the peace, against H. and C., and filed a transcript with the county clerk, who docketed it under the letter H only.—*Held*, the judgment was a lien upon C.'s real estate, as against him, and as against subsequent purchasers with notice. *Id.*
4. C., after such entry of the judgment, sold his real estate, the only property from which the debt could have been made, to M.; and in an action by plaintiff against the county clerk, for neglect to make a proper docket, it failing to appear that M. did not have notice of the judgment when he purchased.—*Held*, the action was not sustained. *Id.*
5. Otherwise, it seems, if plaintiff had shown an absolute loss of his judgment through defendant's neglect. *Id.*
6. An execution was issued to the sheriff in September, 1838; on the 26th of the same month, he caused notice of the sale of certain real estate, belonging to the judgment debtor, for the 1st November ensuing, to be inserted in a newspaper, printed in the proper county, and continued once a week, for six successive weeks, and sold said property under the execution, at an adjourned day of sale. The judgment debtor died in October, 1838.—*Held*, a valid sale, as against the heirs-at-law of the judgment debtor, notwithstanding the latter's death pending the advertisement. *Wood v. Moorhouse.* 405

7. Notices of the sale were posted by the sheriff for a shorter time than directed by the statute; the plaintiff in the execution purchased at the sale, without knowledge of the irregularity, for less than his judgment, and assigned the certificate, for a valuable consideration; and the same was several times further assigned to assignees for value and without notice; and within fifteen months after the sale, the last assignee, who was also owner by assignment of a judgment lien on the property, redeemed the premises, and obtained a sheriff's deed therefor. In 1848, a mortgage, executed in 1835, upon the property, was foreclosed, the property sold, and the purchaser entered at once into possession, and continued to occupy through those claiming under him at the time of this suit. The heirs-at-law of the judgment debtor, the eldest of whom, at the time of his death (October 1838), was seven years of age, not being made parties to the foreclosure, brought this suit, in 1862, to redeem the property from the said mortgage.—*Held*, the plaintiff's title in the property had been divested by the execution sale, redemption, and deed thereon, and the complaint was properly dismissed. *Id.*
8. It seems, the purchaser at the execution sale, though plaintiff in the execution, was not chargeable with notice of the irregularities in the sheriff's proceedings under the execution. *Id.*
9. And it seems, although the court may, on motion, set aside the sale for such irregularities, and order another, yet, when the party injured delays until the sale has been consummated, or until the time for making a motion has gone by, the purchaser, although plaintiff in the judgment, must be considered a *bona fide* purchaser, under § 40, 2 R. S., 369. *Id.*
10. And if not a *bona fide* purchaser, it seems, if he has assigned the certificate, or a redeeming creditor has acquired his interest for value paid, the judgment debtor cannot assail the title of such purchaser, or creditor, by reason of defects or irregularities in the proceedings to sell. *Id.*
11. It seems that every person buying at a sheriff's sale, for the purpose of satisfying an honest debt, is a *bona fide* purchaser. *Id.*
12. It seems that the statute relating to the time and manner of giving notice is directory merely, and non-compliance with its provisions does not vitiate the sale; and if mandatory, the remedy is by motion. *Id.*
13. That where a sale is made in violation of law, *e. g.*, at a time before sunrise, &c., the purchaser will be presumed to know the law, and though he acts in good faith, that it is not in accordance therewith; otherwise, however, where the sheriff's proceedings have been irregular. In the latter case, the purchaser is at liberty to presume that the officer has discharged his official duty. *Id.*
14. *Held*, therefore, that it would be presumed in favor of the proceedings on the redemption in question, that the money was paid by the redeeming creditor to the purchaser, creditor, or officer making the sale, as required by §§ 59 and 60, 2 R. S., 373. *Id.*
15. Also, that such creditor had produced a certified copy of the judgment on which he redeemed, together with a verified copy of the assignment, or an affidavit of the amount due (§ 60). *Id.*
16. Also, that such creditor had caused the execution of all assignments of the certificates to be acknowledged, or proved as deeds, as required (*Id.* 297, § 69), and to be filed in the office of the county clerk. *Id.*
- See* ESTOPPEL, 1, 2, 3.
- JUDICIAL DISCRETION**
- See* DISCRETION.
- JUDICIAL SALE**
- See* COUNTY COURT, 1 to 4.

JURISDICTION.

See COUNTY COURT, 1 to 7.
JUSTICE OF THE PEACE, 1, 2, 3.

JURY AND JURY TRIAL.

1. There being some evidence of an acceptance and promise to pay, for services rendered on special contract, a request to charge the jury, that if they find that the services were not performed in a workmanlike manner, they must find for the defendant, is properly denied. The most that defendant can claim in such case is to recoup damages. *Hollis v. Wagar.* 4
2. On the trial of an action before a justice of the peace, for trespass by defendant's cattle, triers were appointed, and a juror was, on their decision, excused for favor; the defendant then asked that all the jurors summoned might be tried by triers. The justice examined them separately, under oath, and they testified that they believed the law in relation to cattle running on the highway to be a good law. No other objection to their competency appearing.—*Held*, the justice properly refused to submit the testimony of the jurors to triers. *McNall v. McClure.* 32
3. The case of *Smith v. Floyd* (18 Barb., 522) distinguished. *Id.*

See QUO WARRANTO, 3.

JUSTICE OF THE PEACE.

1. A justice of the peace has no authority to make the preliminary examination, or to issue his warrant for the apprehension of the reputed father of a bastard, of his own motion, or otherwise than upon the application of the officers designated by the statute, made in the particular case, in which authority is expressly given to such officer or officers respectively to make it. (1 R. S., § 5, p. 642.) *Sprague v. Eccleston.* 74

2. A mother, and her illegitimate child (born in Otsego county) being chargeable for their support as paupers, upon the town of McDonough, Chenango county, and provided for by that town at the county poor-house in the town of Preston, in Chenango county, the overseers of the poor of the town of McDonough applied to a justice of the peace, of their county, who went to Preston, took the examination of the mother, and thereupon issued his warrant, upon which the putative father was arrested and brought before him.—*Held*, the justice acted without jurisdiction, and was liable for damages, as were also the overseers who induced him to act. *Id.*

3. It seems that if the overseers had brought the mother into the town of McDonough, and had her examination taken there, the plaintiff might have been properly arrested. *Id.*

4. The court excluded evidence of the advice of counsel offered in mitigation, but charged the jury that it was not a case for smart money; and the jury gave a verdict for substantially the actual damages proven.—*Held*, no error was committed to the prejudice of defendants. *Id.*

JUSTICE'S COURT.

See COURT OF A JUSTICE OF THE PEACE.

JUVENILE DELINQUENTS.

See WITNESS, 1, 2, 3.

LABORERS.

See CONTRACTOR, 1, 2.

LANDLORD AND TENANT.

See FORCIBLE ENTRY AND DETAIN-
ER, 5, 12.
GUARDIAN, 2.

LEASE.

1. Though a lease for years is a chattel interest which goes to the personal representatives, ejectment lies to recover possession of the land demised. *Olendorf v. Cook.* 87

See FORCIBLE ENTRY AND DETAIN-
ER, 5, 6, 11, 12, 13, 14.

LEASE IN FEE.

See TAXES AND ASSESSMENTS, 1, 2,
3, 4.

LEGACIES.

1. A legacy being given to the treasurer of Yale College, for the trustees thereof, with directions for investment and accumulation, for educational purposes, it was held that the bequest should be paid, and that the question, whether the fund could be administered, and interest accumulated as directed, must be determined by the courts of Connecticut. *Manice v. Manice.* 848

See WILL, 1 to 7, 8, 15, 16.

LEGISLATIVE POWER.

1. The legislature having passed a law by a majority vote, appropriating money for the purpose of removing obstructions from, and improving the navigation of, the navigable portion of the Boquet river; a river flowing into Lake Champlain, and navigable therefrom for three miles, for boats of light burden, used in the transportation of coal, iron and other com-

modities.—*Held*, the appropriation was neither for local nor private purposes, and the law was constitutionally enacted and valid. PECKHAM, J. dissenting. *People v. Allen.* 248

2. It seems, when there may be doubt, as to whether an appropriation is or is not for local or private purposes, and it is not made to appear that, in point of fact, it is for one or the other of such purposes, the presumption will be in favor of the constitutionality of the legislative proceedings. Per HOGEBOM, J. *Id.*
3. In the application of the clause of the constitution, which makes a two-third vote of the legislature requisite for the passage of bills, "appropriating the public moneys or property, for local or private purposes;" where an improvement ordered is clearly of a local character, the judicial department may pronounce it unconstitutional; but where the question is one of degree or extent, and not of the legal effect of a palpable fact, it falls within the domain of the legislature. *Id.*
4. The practice of the legislature, with reference to various acts making appropriations of money for purposes similar to the act in question, pointed out; and the meaning of the terms "local" and "private" commented upon and explained. *Id.*
5. Whether the legislature has constitutional power to authorize the taking of land for school purposes. *Quere. King v. Phillips.* 421

LEX FORI.

See LEGACIES, 1

LIABILITY.

See ACTION, 1, 2.

CONSIGNOR AND CONSIGNEE, 1.
CONTRACTOR, 1, 2.
CONTRIBUTION, 1, 2.
DAMAGES, 1.

DEVISE AND DEVISEE, 1, 2.
 EXECUTORS AND ADMINISTRATORS, 1 to 6 inclusive.
 HUSBAND AND WIFE, 1, 2, 3.
 INNKEEPER, 1, 2, 3, 4.
 JUDGMENTS AND EXECUTIONS, 3, 4, 5.
 JUSTICE OF THE PEACE, 2, 3.
 NUISANCE, 4, 6, 7.
 PRINCIPAL AND AGENT, 3, 4, 5.
 SUPERINTENDENT OF CANALS, 1, 2, 3.
 TELEGRAPH COMPANIES, 1 to 8 inclusive.
 VENDOR AND PURCHASER OF LANDS, 8, 9.

LICENSE

See FORCIBLE ENTRY AND DETAINER, 13, 14.
 TENANT IN COMMON, 5.

LIEN.

1. The defendant, owning and occupying a house and lot, conveyed the same to his infant daughter, who resided with him as a member of his family, and the house being destroyed by fire, employed the plaintiffs to build him a dwelling, upon the old foundation; the plaintiffs performed the work, and filing the required notice (Laws 1854, p. 1,086, chap. 204, extended Laws, 1858, p. 324, chap. 204), claimed a mechanic's lien for the value of the labor and materials; defendant took possession of the new house, and continued to reside there with his said family. In an action under the statute for judgment, as upon a mechanic's lien,—*Held*, the defendant had no interest in the house erected, other than as guardian of his daughter, and the plaintiffs had obtained no lien thereon. *Copley v. O'Neil*. 214

See JUDGMENTS AND EXECUTIONS, 3.
 BOARDING-HOUSEKEEPER, 1, 2.

LOCAL AND PRIVATE PURPOSES.

See LEGISLATIVE POWER, 1, 2, 3, 4.

MANDAMUS.

1. A mandamus lies against the comptroller, to compel payment of moneys appropriated by the legislature, to the improvement of navigation, &c., on his refusal to pay the same. *People v. Allen*. 248

MARRIED WOMEN.

1. The promissory note of a married woman, given for goods which had been purchased by her upon credit, for family use, while her husband is residing and cohabiting with her, and supporting his family, is absolutely void, and has no foundation, either in law, equity, conscience or good morals, unless there is some special agreement by which the goods are sold to the wife, for her exclusive use, upon the credit of her separate property, and not upon the credit of her husband. *Smith v. Allen*. 101
2. A subsequent promise to pay such note, made by the wife, after the husband's death, is equally void. *Id.*
3. And that the vendors, of their own motion, charged the goods on their books to the wife personally, cannot affect her rights. *Id.*
4. The case of *Goulding v. Davidson* (26 N. Y., 604), cited, and distinguished. *Id.*
5. Plaintiff was a married woman, and being in possession of premises belonging to her husband, who had absconded, and while preparing to leave the same, made a contract for a certain sum with the defendant, who held a mortgage on the premises which was due, to remain for a time, and at the end thereof deliver possession to him. In an action by the plaintiff, after performance by her, to recover the sum which the defendant agreed to pay.—*Held*, the promise to pay was supported by a sufficient consideration. *Hart v. Young*. 417

6. Plaintiff's performance was advantageous to the defendant, and an inconvenience to herself; being in possession, as wife of the owner of the fee, her agreement to surrender it, was a sufficient consideration to support the defendant's agreement; and her possession as owner of a contingent right of dower was a subsisting right of which she might make disposal by sale. *Id.*

7. The plaintiff was authorized (Laws 1860, chap. 90) to make the contract in her own right, and whether she so made it, or for her husband, was a question of fact; and defendant having asked a decision upon the question by the court, when about to submit it to the jury, and the court deciding for the plaintiff,—*Held*, there was no error. *Id.*

See HUSBAND AND WIFE, 1, 2, 8.

MASTER AND SERVANT.

1. An employee, who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which he has had opportunity to ascertain. *Semble. Owen v. N. Y. Cent. R. R. Co.* 108

2. A brakeman, in the employ of a railroad company, while discharging duties in the line of his employment, upon the roof of a freight car, was carried against a highway bridge, and sustained injuries, for which he brought an action against his employer. The bridge was some three and a half feet higher than the top of the highest freight car in use by the company, and had so remained for many years, and since the construction of the railway. The brakeman had entered into the employment of the company with knowledge of the position and height of the bridge, and he had had opportunity of informing himself as to its continuance in the same position.—*Held*, that the plaintiff should have been non-suited, the danger from the bridge being clearly incident to the labor he undertook to perform. *Id.*

3. In view of the brakeman's knowledge as to the bridge, his omission to avoid the accident, by stooping, was such want of ordinary care and caution as would have defeated his action, if otherwise maintainable. *Id.*

4. Having assumed the risk of injury to his person, from the bridge, evidence offered by him upon the trial, tending to show its dangerous character, was properly excluded. *Id.*

MEASURE OF DAMAGES.

See DAMAGES.
TELEGRAPH COMPANIES, 8.

MECHANIC'S LIEN.

See LIEN, 1.

MINISTERIAL ACT.

See SUPERINTENDENT OF CANALS, 1.

MONEY PAID.

1. The plaintiff having been compelled, by levy and sale of his property, to pay the unpaid tax, of a former occupant of his premises, with which he had been charged upon the annual assessment rolls, by the board of supervisors, as a returned tax, and for which he was not liable, sued the county to recover the amount so paid.—*Held*, the complaint stated no cause of action. *Newman v. The Supervisors of Livingston County.* 476

MONEY PAID BY MISTAKE.

1. It is, it seems, a sound principle of law, that in an action for money paid by mistake in facts, the plaintiff should recover irrespective of any negligence with which he may be chargeable, unless it has caused injury to the defendant. *Union*

Nat. Bank of Troy v. Sixth Nat. Bank of N. Y. 18

2 Thus, where defendant discounted a note for G., and sent it to plaintiff for collection, and plaintiff sent it to an agent for the same purpose, and remitted to defendant before any return from the agent; and it then transpired that the agent, having presented the note for payment, it had been dishonored by the maker and protested, and notice of protest mailed to the parties entitled, which had been received by defendant and G., though it had not reached the plaintiff; and that G., upon notice of the protest, had repaid defendant for the note; and that defendant, after notice of the protest, and the repayment by G., receiving plaintiff's remittance, had refunded to G., and the note was usurious and uncollectable. In an action brought by plaintiff to recover the amount remitted to defendant, as for money paid by mistake, it failing to appear that defendant had no remedy over against G.—*Held*, the action would lie, although plaintiff might be chargeable with negligence in not ascertaining that the note had been dishonored before making the remittance to defendant. *Id.*

3. An action could not be sustained by the plaintiff, against G., for the money paid him on receipt of plaintiff's remittance, but G. would be liable to refund to defendant.—*Seemle.* *Id.*

See VENDOR AND PURCHASER, 2.

MORTGAGE AND MORTGAGEE OF LANDS.

See DEVISE AND DEVISEE, 1, 2.
GRANTEE, 1, 2.
VENDOR AND PURCHASER OF LANDS, 3, 4, 5, 6, 7.

MORTGAGE OF CHATTELS.

1. It was shown, in an action to recover possession of personal prop-
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erty, that E., being owner of the property, had given his promissory note to C., and secured its payment by a mortgage thereon, and after the note was over due had procured from C. an assignment to the plaintiff of the mortgage without the note, as security for money thereupon loaned by the latter to E.; that plaintiff re-filed the mortgage, and after the assignment the parties regarded it as security for the plaintiff's loan, and not for C.'s note.—*Held*, the doctrine that a transfer of the incident without the principal is a nullity, was inapplicable. *Campbell v. Burch.* 178

2. That the plaintiff proved a *prima facie* title to the property. *Id.*

3. That the assignment of the mortgage by the mortgagee at the request of the mortgagor, was evidence of an agreement between them that the mortgage should no longer continue as a security for the payment of the note. *Id.*

4. That the assignment had the effect to transfer C.'s interest as mortgagor in the mortgaged property to the assignee; or, if not, might be treated as the execution of a new mortgage by E. to secure plaintiff's debt, and a valid security in plaintiff's hands against creditors. *Id.*

5. A mortgagee of chattels, whose mortgage, in addition to the usual condition in case of non-payment, &c., contains a clause authorizing him, at any time, if he shall "deem himself unsafe," to take possession of the mortgaged property, "and to sell the same at public or private sale," may, in conformity to the terms of such clause, take possession of said property before the debt falls due, and sell the same, without making a demand for payment, and without giving personal notice of sale to the mortgagor. *Huggans v. Fryer.* 276

6. If the property be unsafe, it seems, under such a clause, the mortgage debt becomes due, and the mortgagee acquires an absolute title to the property, subject to the mort-

gagor's right to redeem; and the right of redemption is cut off by the sale. *Id.*

See EVIDENCE, 14, 15, 16.

NEGLIGENCE.

See MASTER AND SERVANT, 3, TELEGRAPH COMPANIES, 9.

NEW TRIAL.

1. A new trial, on the ground of newly discovered evidence, should not be granted, when such evidence does not go to the merits, and plainly appear to be relevant to some material issue raised by the pleadings; nor when such evidence is cumulative, or only tends to contradict, on a purely circumstantial point, a witness examined on the trial; nor when circumstances show that by greater diligence on the part of the moving party, or his agent or attorney, the evidence is ordinarily discoverable previous to the trial. *Sproul v. The Resolute Fire Ins. Co.* 71
2. Surprise of counsel at the testimony of a witness is not of itself any ground for a new trial. *Id.*
3. Case on motion for a new trial on the grounds of surprise and newly discovered evidence criticised, per BALCOM, J. *Id.*
4. In an action for a loss under a fire insurance policy, defendant proved at the trial, the unusual position and flaming of a lamp, fifteen days before the fire, as tending to show an attempt, by plaintiff, at that time, to set fire to the premises; a witness then explained that the position and flaming of the lamp were accidental, testifying that he was present at the time, on account of a sick child of plaintiff's, which died a day or two afterward; and defendant, the verdict being for plaintiff, moved for a new trial, on newly discovered evidence that

the child, in fact, died some days before the unusual burning or flaming of the lamp referred to.—*Held*, that the order granting a new trial on this ground should be reversed. *Id.*

5. The power of this court to grant new trials under § 87, 2 R. S., 309, is confined to actions of the same character as the former action of ejectment. *Shumway v. Shumway.* 474
6. On granting a new trial, on appeal from a referee's decision, the order of reference was allowed to stand, with leave to move for a new referee. *White v. Smith.* 469

See REFERENCE AND REFEREE, 6.

NON-RESIDENT ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 7.

NOTICE.

See EXECUTORS AND ADMINISTRATORS, 8.
 INNKEEPER, 1, 2, 4.
 JUDGMENTS AND EXECUTIONS, 8, 12.
 MORTGAGE OF CHATTELS, 5.
 TAXES AND ASSESSMENTS, 4.
 TELEGRAPH COMPANIES, 7.
 VENDOR AND PURCHASER OF LANDS, 3, 4, 5.

NUISANCE.

1. Every encroachment upon a public highway is not a nuisance. *Howard v. Robbins.* 63
2. An encroachment, which does not prevent the use of the highway for its ordinary purposes, is not, as such, a nuisance. *Id.*
3. Nor have the trustees of the village of Watkins, by the charter of that village (§ 4, tit. 4, ch. 123, Laws 1861) power to declare that

a nuisance, which, by law, is not recognized as such. *Id.*

4. Accordingly, where said trustees, proceeding in the manner directed by said charter, declared an encroachment on one of the village streets to be a nuisance, and the defendants, being thereupon deputed by them so to do, removed it; and in an action by the owner to recover damages for such removal, the evidence did not establish a nuisance in fact. *Held*, defendants were not protected by the determination and direction of the trustees. *Id.*

5. It seems, where an encroachment on a highway constitutes a nuisance, it may be abated to that degree only which will enable the public to enjoy the right of way. *Id.*

6. To charge one who has created a nuisance, with liability for its continuance, after he has parted with the property upon which it is situated or caused, he must be shown to derive some benefit from the continuance; or to have sold with warranty of the continued use of the property, as enjoyed while the nuisance existed. *Hanes v. Cowing*. 288

7. And it seems, in the latter case, a continued enjoyment of the nuisance, or of that which creates it, must be warranted. *Id.*

See ESTOPPEL, 1.

OFFICERS.

There can be no such thing as an officer *de facto*, as against the people, in an action by them to try the title to the office. The doctrine in respect to officers *de facto* only applies to, and in favor of third persons, and to protect innocent parties who trust to the apparent title to an office. *People v. Albany and Susquehanna Railroad Co.* 308

See CORPORATION, 1.

ONUS PROBANDI.

See GENERAL RAILROAD LAWS, 2.
JUDGMENTS AND EXECUTIONS, 4, 5.
PRACTICE, 14.
SALE OF CHATTELS, 1.
TELEGRAPH COMPANIES, 9.

OPINIONS.

See EVIDENCE, 11.

OVERSEERS OF THE POOR.

See JUSTICE OF THE PEACE, 1, 2, 3.

PARTNERSHIP.

1. Defendant being a member of a partnership firm, purchased from one of its employees the patent right in an article of use and value in the firm business, and without disclosing or being asked to disclose the terms upon which he had purchased, offered to sell it at an advance to the firm; the firm had the offer under consideration for some months, using the patented article meanwhile, and finally declined to buy, preferring to pay defendant a royalty for use of the article, which it did.—*Held*, the rights, if any, which the firm originally had to claim the defendant's purchase as for its benefit, could not be insisted on after its dissolution. *BRADY, J., dissenting. American Bank Note Company v. Edison.* 388

2. *Held*, further, that said patent right did not pass under a transfer of the property of the firm. *Id.*

3. And the said firm having with other firms, and one G., all engaged in the same business, entered into articles of association, reciting that the parties thereto, as firms and individuals theretofore and then, engaged in the business of, &c., were desirous to unite their establishments, and also reciting, as follows: "We agree, that

upon signing these articles, all the machinery, presses, tools, instruments, plates and dies, stock of materials, furniture and effects belonging to our establishments in the business, * * * * or the business collateral thereto, shall be and by virtue of these articles are transferred to the trustees, &c."—*Held*, the agreement included all the property of the establishments, whether conducted by firms or individuals, but did not embrace individual property of members of firms, nor any property not used in the establishments as they existed previous to the association.

Id.

4. And that this was so, although the articles were signed by the individual members of the firms.

Id.

5. In an action upon a check made payable to bearer, running in a firm name, brought after its dissolution, against G. and M., who were the members thereof, M. only answered, and he averred a combination between G. and the plaintiff, to defraud him of the amount of the check. It appeared upon the trial that G. individually paying an indebtedness of the firm, had thereupon made the check, and afterward for a personal indebtedness of his own, delivered it to the plaintiff; the time of delivery of the check to the plaintiff was in dispute, the latter claimed a delivery before, and M. the defendant, after, the firm's dissolution. The judge connecting the two propositions together, charged the jury that to entitle the plaintiff to a verdict, they must find that the check was issued before the dissolution, and that it passed into the hands of the plaintiff before the dissolution; there was a general exception by the defendant, M., to this charge.—*Held*, there was no error. *Gale v. Miller*. 451

6. The partner's right to issue the check (that is, to make and appropriate it to any purpose) ceased with the dissolution of the firm.

Id.

7. If the check had been made before the dissolution of the firm, and disposed of by G. afterward, it would have been subject in the hands of the plaintiff to the equities existing against it, and such equities would not be a proper subject of adjustment in an action between the plaintiff and the members of the firm. Nor was M. obliged to insist on such equities in such a suit; he might rely upon fraud in the issuing of the note after the dissolution. Per *MILLER*, P. J.

Id.

See DEVISE AND DEVISEE, 1, 2, 3.
REAL PARTY IN INTEREST, 1.

PARTY IN INTEREST.

See REAL PARTY IN INTEREST.

PLEADINGS.

See ADMISSIONS, 1.
COUNTERCLAIM, 1, 2, 3.
DISCRETION, 1.
FORCIBLE ENTRY AND DETAIN-
ER, 1, 10.
PARTNERSHIP, 7.
PRACTICE, 8, 13, 14, 15.
SUMMONS, 4.
TELEGRAPH COMPANIES, 9.

POSSESSION.

See FORCIBLE ENTRY AND DETAIN-
ER, 2, 4, 5, 6, 7, 9 to 13, 14.
HUSBAND AND WIFE, 1, 2, 3.
MORTGAGE OF CHATTELS, 5.
PRINCIPAL AND AGENT, 6.
TENANT IN COMMON, 1, 3 to 7,
inclusive.

POWERS, AND POWERS IN TRUST.

See WILL, 7, 14.

PRACTICE.

1. The practice, in bringing questions for review, before the General Term, on appeals in this court stated. Per MARVIN, J. *Manley v. Insurance Co. of N. America.* 20
2. The methods of providing for a review in this court, and in the Court of Appeals, when the appeal is from a judgment entered upon a referee's report, stated and distinguished. *Id.*
3. Where an issue is raised by the answer upon reforming the instrument under which ejectment is brought (no issues having been settled with direction to try by jury), it should either be tried by the court prior to the trial of the principal issue, or reserved from the jury on submission of the jury issues. Per MARVIN, J. *Oleendorf v. Cook.* 37
4. When in such case, therefore, a trial occurs upon all the issues made, it is not error if the judge refuse to submit the question of reformation to the jury under evidence upon that issue. *Id.*
5. Defendant on the trial of an action for possession of real property, excepted to a decision allowing a description of the premises to be inserted in the complaint, and the court, afterward under his general objection, directed the jury to find for possession by plaintiff according to the amended complaint, to which defendant also excepted. Whether he might, under such objection, claim as error on appeal that the judgment gave a longer term of possession than the proof warranted. *Quere. Id.*
6. Judgment being for possession as above stated, and plaintiff's title having expired since the trial, the judgment was affirmed, and execution for possession restrained. *Id.*
7. The joining of law and equity jurisdiction, in the same court, has not changed the practice, nor effected a repeal of any of the provisions of the statute, regulating the course of proceedings on appeals from surrogates' decrees, admitting or refusing probate of wills. *Johnson v. Hicks.* 150
8. In such cases, when an appeal might formerly have been taken from the decision of the circuit judge to the Court of Chancery. (2 R. S., 609, § 100), the review on appeal is still in the nature of a rehearing in equity. *Id.*
9. But when the surrogate's decision is reversed upon a question of fact, the Supreme Court, on reversal, should direct an issue to be made up, to try the questions arising upon the application to prove such will, and direct the same to be tried at the circuit. (2 R. S., 66, § 57; 609, § 98.) And until the final determination of such issue, the case proceeds as an action at law, and is to be so considered on a motion for a new trial. *Id.*
10. The award of such an issue to be tried by a jury, is a matter of right. And the Supreme Court in reversing, on the facts, a surrogate's decree admitting or refusing probate of a will, cannot, at its discretion, direct the surrogate to enter a final decree in accordance with the terms of the order of reversal. *Id.*
11. The case of *Pilling v. Pilling* (45 Barb., 86), reviewed and disapproved, so far as it conflicts with the foregoing. *Id.*
12. Judgment ordered, at the suit of the people vacating certain receiverships, perpetually restraining proceedings in certain suits affecting the officers, books, stock and property of the corporation, and ordering such suits to be discontinued without costs. *People v. Albany and Susquehanna Railroad Co.* 308
13. Defendant made a general denial, except as expressly admitted, to a complaint on a promissory note, payable to bearer, and averred that the note was obtained by fraudulent representations; that it was not given to plaintiff, and defendant had no knowledge, &c., whether it

- had been delivered to him before maturity for value; and denying that plaintiff was a *bona fide* holder, averred that if he took it at all, it was with notice of the circumstances, &c. Plaintiff on affidavits showing, that he had bought the note before maturity, in good faith, for a valuable consideration, without notice of a defence, and that he was the owner thereof, moved to strike out the answer as sham and irrelevant; but did not, for the purposes of the motion, dispute defendant's averment of fraud.—*Held*, an order striking out the answer as sham must be reversed. *Winslow v. Ferguson*. 486
14. If the averments in defendant's answer, which were contradicted by the affidavits, were untrue, the whole defence must fail; but if plaintiff conceded the fraudulent inception of the note, he assumed the *onus* of showing the falsity of such averments, and this he might not do by affidavit. *Id.*
15. Section 152 of the Code, does not permit a part of an entire answer or separate defence to be stricken out as sham. Per MULLIN, J. *Id.*
16. A demurrer will not be sustained to an answer, when the complaint states no cause of action, and although such demurrer is not made, to all the defences stated in the answer. *Newman v. The Board of Supervisors of Livingston County*. 476
17. Nor can a motion to strike out an answer to such complaint, as sham, &c., be granted. *Id.*
18. On the application for removal of a cause, from a State into the federal court, under § 12 of the U. S. judiciary act of 1789 (1 U. S. Stat. at large, 79; 1 Bright. Dig., 128), all the defendants were required to join. Per BRADY, J. *Cooke v. State Nat. Bank of Boston*. 494
19. *Norton v. Hayes* (4 Denio, 245), *Vandervoort v. Palmer, Cook & Co.* (4 Duer., 677), and *Livingston v. Gibbons* (4 John. Ch., 94), explained. *Id.*
20. A like application, under the Law of 1867 (14 U. S. Stat. at large, 558), upon the ground, that from prejudice or local interest, justice cannot be obtained in the State court, is improperly granted, when made by one of several defendants. *Id.*
21. And where an application has been so made by one defendant only, and bonds have been furnished and accepted, and an order of removal granted, the error will be corrected on appeal. *Id.*
22. So held, on appeal from an order, granted on application made, after issue joined, motion to dissolve attachment denied, the cause noticed and on the calendar for trial, and other proceedings had therein. *Id.*
23. Whether the statute authorizes such an application to be made by a corporation, quere. Per INGRAHAM, J. *Id.*
- See ATTACHMENT, 1.
 DEVISE AND DEVISEE, 3.
 DISCRETION, 1.
 ELECTION OF DIRECTORS, 6.
 EXECUTORS AND ADMINISTRATORS, 1 to 7.
 FORCIBLE ENTRY AND DETAINER, 1, 3, 8.
 JUDGMENTS AND EXECUTIONS, 9.
 MANDAMUS, 1.
 MARRIED WOMEN, 7.
 NEW TRIAL, 1 to 7.
 QUO WARRANTO, 8.
 RECEIVER, 1.
 REFERENCE AND REFEREE, 8 to 7.
 TRIAL, 1.
- PRESUMPTIONS.
- See HUSBAND AND WIFE, 2.
 JUDGMENTS AND EXECUTIONS, 18 to 16 inclusive.
 STAMP, 1.
 TELEGRAPH COMPANIES, 3.
 TENANT IN COMMON, 5.
 VENDOR AND PURCHASER OF LANDS, 3, 4, 5.
- PRIMA FACIE TITLE.
- See MORTGAGE OF CHATTELS, 1, 2.

PRINCIPAL AND AGENT.

1. Defendant was president of an incorporated company known, as the T. O. and M. Company, and intending and being empowered to bind the company thereby, made a note, running as follows: "I promise to pay, as president of the T. O. and M. Co., &c.," signed his name, adding, "President of the T. O. and M. Co." and for value received, delivered it to plaintiff; the plaintiff knew of the defendant's agency, and, that in making the note, he intended to charge only the company.—*Held*, an action seeking to charge defendant personally on the note, could not be sustained. *Randall v. Snyder*. 163
2. Where an agent of a corporation contracts on its behalf, making no representation as to the power of the corporation, he is not personally bound by the contract if it turns out it was *ultra vires* as to the corporation. *Id.*
3. One who has induced an agent to go beyond his powers, and enter into a contract unauthorized by his principal, cannot hold such agent personally liable upon the contract. Per *INGRAHAM, J. Aspinwall v. Torrance*. 381
4. It seems, an agent exceeding his authority, but acting in good faith, where the facts are known to both parties, is not personally liable upon a contract so made for his principal. *Id.*
5. And it seems, where an agent pretends to act for his principal, in making a contract, knowing he has not authority therefor, he is not liable upon the contract, but upon a warranty of his agency. *Id.*
6. In an action to recover possession of merchandise, the plaintiff, to establish his title, proved that he had given an order upon the manufacturers in England, through two of the defendants, as his agents, for the articles to be made and sent to him at New York, and had received from such manufacturers,

notice of the acceptance of the order; but that said defendants, having terminated their agency, had substituted one of themselves in the order, as the person for whom the goods were to be manufactured; and that the manufacturers, under the direction of the defendant, so substituted, had forwarded the same with knowledge of the plaintiff's claim, to the other defendants at New York, by whom they had been received.—*Held*, the plaintiff established no title which would enable him to maintain the action. *Mackay v. Mackay*. 506

See STATUTE OF FRAUDS, 1 to 5.
STOCKHOLDERS, 2.
TELEGRAPH COMPANIES, 1

PRIVATE PROPERTY.

See SUPERINTENDENT OF CANALS, 1, 2, 3.

PROMISE.

1. The law implies a promise of indemnity to an agent, who, believing the directions of his principal to be rightful, executes them; and this, where there is no deceit or misrepresentation by the principal, respecting his right to delegate the authority. *Turner v. Jones*. 147
2. It is, it seems, a general principle of law, to imply a promise, where none is expressly made, and equity and good conscience require one. *Id.*

PROMISSORY NOTE.

See MARRIED WOMEN, 1, 2.
PRINCIPAL AND AGENT, 1, 2.
REAL PARTY IN INTEREST, 1.

PUBLIC NECESSITY.

See SUPERINTENDENT OF CANALS, 1, 2.

QUO WARRANTO.

1. An action in the nature of a *quo warranto* (Code, § 482) does not lie against the secretary and treasurer of a railroad company, holding his office as a mere servant thereof, and at the will of its directors. *The People v. Hills.* 202
2. What constitutes an office within the meaning of the statute (2 R. S., 581, Code, § 482), extending this remedy, must still be determined by the general rules of the common law. *Id.*
3. Issues of fact in the civil actions substituted for the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, are not, under the Code, triable, as of course, by a jury. When, in such action, the complaint and the nature of the case call for equitable relief, the cause regularly comes on for trial by the court. And, although on timely application, the question of title to the office might be tried before a jury, a demand for a jury, made after the parties and witnesses are present, prepared for the trial, and plaintiff has opened the case, read the pleadings and rested, may be refused. *People v. Albany and Susquehanna R. R. Co.* 306

RAILROAD COMPANIES.

1. The directors of a railroad company are authorized, but not imperatively required, by the general railroad act (Laws 1851, chap. 140, § 6), to appoint a secretary and treasurer. *People v. Hills.* 202
2. The statute (Laws 1850, chap. 389, § 290, amended 1867, p. 92), giving power to the city of Rochester, as the owner of stock of the Rochester and Genesee Valley Railroad Company, to appoint, through its common counsel, a portion of the board of directors of said company, does not authorize the election of any person to such board who is not a stockholder in his own right, and qualified under § 6 of the general railroad act. *Id.*

See CONTRACT, 4, 5.
 CONTRACTOR, 1, 2.
 EVIDENCE, 17.
 MASTER AND SERVANT, 1, 2, 3.
 QUO WARRANTO, 1, 2.

RATIFICATION.

See INFANT, 1, 2.
 STATUTE OF FRAUDS, 3.

REAL PARTY IN INTEREST.

1. To a complaint by the payee, on a negotiable promissory note, the defendants answered a non-joinder of parties plaintiff, and in order to establish the defence, proved that the note was made and delivered to the plaintiff, a member of a partnership firm, with the firm's consent, for moneys loaned from firm funds, and in furtherance of its contract.—*Held*, plaintiff was entitled to maintain the action, and the defence was not sustained. *Mynderse v. Snook.* 488

See ACTION, 1, 2.

RECEIVER.

1. The practice in relation to the appointment of receivers *ex parte* reviewed. *People v. Albany and Susquehanna R. R. Co.* 308

See EVIDENCE, 17.
 PRACTICE, 12.

RECOUPMENT.

See COUNTERCLAIM, 1 3.

REDEMPTION.

See MORTGAGE OF CHATTELS, 6

REFERENCE AND REFEREE.

1. A referee's finding of the non-receipt by a bank, of notice of protest sent to its cashier, is sufficiently supported by uncontradicted testimony thereto, given by one of the bank clerks, whose duties would not necessarily bring to him information of the receipt, although the ground of the clerk's knowledge does not appear. *Union Nat. Bank of Troy v. Sixth Nat. Bank of N. Y.* 18
2. A referee is now required, by rule 82 of this court, to state the facts found by him in his report. *Manley v. Insurance Co. of North America.* 20
3. The General Term will assume that a referee has so stated all the facts found by him affirmatively, and that he negatives those facts litigated on the trial, upon which his report is silent. *Id.*
4. And on appeal from a judgment entered on the report of a referee, will review the questions of fact upon the evidence, and affirm or reverse the referee's decision thereon, whether express, or implied from the silence of his report. *Id.*
5. The remedy, in this court, to secure the performance of his duty by a referee, is by motion. If important, for a proper review, that his findings of fact shall be more ample, the proper practice is a motion to recommit the report with directions to find how the fact was upon the evidence. *Id.*
6. The suggestion in *Grant v. Morse* (22 N. Y., 823), that this court would perhaps grant a new trial for a referee's refusal, in settling the case, to find upon all the issues, disapproved. *Id.*

See ADMISSIONS, 1.
 COMPTROLLER, 1.
 EXECUTORS AND ADMINISTRATORS, 9.
 NEW TRIAL, 6.
 TRIAL, 1.

RENTS.

See TAXES AND ASSESSMENTS, 1 to 5.

RES INTER ALIOS ACTA.

See ESTOPPEL, 2.

RES JUDICATA.

See ESTOPPEL, 1, 2, 3.

SALE OF CHATTELS.

1. To maintain an action for breach of the implied warranty of title, on a sale and delivery of a chattel, there must have been a retaking of the property by the real owner, but not necessarily eviction by process of law. The vendee may surrender possession to the claimant, and assume the onus of proving the superior title. *Bordwell v. Colia.* 141
2. If there be no actual dispossession, judicial determination against the vendee, establishing the paramount title of the real owner, with a recovery of the value and payment of the recovery, is tantamount to eviction. Per BARKER, J. *Id.*
3. A warranty of title, on sale of personal property, is similar in nature to the covenant for quiet enjoyment in deeds of real estate, and should, by analogy, receive like construction. *Id.*
4. The vendor of a chattel, who, after his vendee has suffered lawful eviction, voluntarily pays the latter's claim for indemnity, may proceed against his own vendor on the implied warranty of title; and he may also give a cause of action by assignment. *Id.*

See EVIDENCE, 14, 15, 16.
 GUARANTY, 1, 2, 3.
 MORTGAGE OF CHATTELS, 5, 6.

SALE OF INFANT'S REAL ESTATE.

See COUNTY COURT, 1 to 7 inclusive.
INFANT, 1, 2.

SALE OF LANDS.

See JUDGMENTS AND EXECUTIONS, 1 to 14.
TAXES AND ASSESSMENTS, 2, 3, 4.
VENDOR AND PURCHASER OF LANDS.

SCHOOL-DISTRICT.

1. The trustees of a school-district may acquire an interest in land as tenants in common with others. *King v. Phillips.* 421
- 2 The trustees of a school-district, built a school-house upon certain premises, and afterward the legislature legalized the site, and authorized the trustees to acquire title thereto, and they thereupon purchased an undivided interest in the premises occupied.—*Held*, the trustees were tenants in common with the other owners. *Id.*

See TENANT IN COMMON, 1 to 6.

SET-OFF.

See COUNTERCLAIM, 3.

SHAM ANSWER.

See PRACTICE, 13, 14, 15, 17.

SHERIFF.

See JUDGMENTS AND EXECUTIONS, 6 to 14.
TAXES AND ASSESSMENTS, 4.

SIGNATURE.

See EVIDENCE, 10, 11.

SPECIAL GUARDIAN.

See INFANT, 1, 2.
COUNTY COURT, 1, 2.

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS, 1.

STAMP.

1. When a stamped instrument is shown to have been without stamp at its delivery, and it does not appear that the omission was with intent to defraud the revenue, it will be presumed to have been lawfully stamped. Per *JOHNSON, J. Burnap v. Laley.* 111

STATUTE OF FRAUDS.

1. A contract for the sale of lands, made by an authorized agent, but not referring to the principal, or signed in the latter's name, does not bind the principal; and in an action against the latter to enforce specific performance, proof of the signer's agency is inadmissible. *Squier v. Norris.* 282
2. So held where a husband having authority to sell, made a contract under seal for the sale of his wife's lands, in his own name, without disclosing his agency. *Id.*
3. Nor is the receipt of a portion of the purchase money by the principal, and his subsequent parol promise to be bound by the contract, a ratification thereof by him. *Id.*
4. To render a contract for sale of land, signed by an agent in his own name, binding on the principal, his agency and principal must appear from the instrument signed. *Id.*

See CONTRACT, 2, 3.

STATUTE OF LIMITATIONS.

1. So long as an attorney is engaged upon a general retainer in the same matter, he may allow a portion of his disbursements or charges to overrun the six years, without peril from the statute of limitations. *Mygatt v. Willcox.* 55
2. Plaintiff was retained by defendants, administrator and administratrix of an estate, and acted for them on a final accounting in 1852, and also on an appeal from the surrogate's decree, which was reversed, and the matter sent back for a rehearing; and the matters before the surrogate, and contested on the appeal, remained undisposed of until settled by agreement of the parties in 1866.—*Held*, that plaintiff's retainer being general, and not terminated by any express act of either party, continued until the final settlement in 1866, and that the statute of limitations did not begin to run against any item of his account for services and disbursements until that time. *Id.*
3. The case of *Adams v. The Fort Plain Bank* (36 N. Y., 255), distinguished. *Id.*

See ACCOUNT STATED, 1, 3.
EXECUTORS AND ADMINISTRATORS, 8, 9.

STOCKHOLDERS.

1. A person who is not a stockholder, is sufficiently authorized to call a meeting of stockholders to order when he holds a proxy, and is requested by the president to call the meeting to order, and act for him, and such call is recognized by the stockholders present. *People v. Albany and Susquehanna R. R. Co.* 308
2. T., as agent for V., had taken from R. a pledge of stock, to secure a note executed by the latter to V.; T. then agreed with R. to take the stock in payment of the note, which he thereupon gave up to R., and there was no transfer of the stock,

but T. retained the certificates; T. had, in the latter transaction, exceeded his authority, and his principal repudiated the purchase.—*Held*, error to charge T. in an action against stockholders for contribution, as the equitable owner of said stock. *Aspinwall v. Torrance* 381

See CONTRIBUTION, 1, 2, 3.
ELECTION OF DIRECTORS, 3, 4, 5.

SUBROGATION.

See VENDOR AND PURCHASER OF LANDS, 7.

SUMMONS.

1. When an action is brought directly upon a contract, express or implied, to recover the moneys due thereby, the summons should be framed in accordance with sub. 1, of § 129 of the Code. *Mason v. Hand.* 66
2. *The People v. Bennett* (6 Abb., 343) upon this point, approved and followed. *Id.*
3. When the action seeks to recover damages arising from a breach of contract, the summons should be in the form required by sub. 2 of said section. *Semble. Id.*
4. The complaint claimed a larger amount than that demanded by the summons.—*Held*, the variance was immaterial. *Id.*

SUPERINTENDENT OF CANALS.

1. In the use of means to restore a canal to a navigable condition after it has been determined that there is an obstruction requiring removal, a superintendent of canal repairs acts ministerially, and is liable for damages if he unnecessarily adopts such a remedy, or proceeds in such a manner as to injure private property. *Hicks v. Dorn.* 81

2. To justify the injury or destruction of private property, there must exist a pressing public necessity both as to the act to be done and the manner of doing it; and whether such a necessity existed is a question of fact to be determined from the circumstances of the case. *Id.*
8. Accordingly, where plaintiff's boat had grounded (without his fault), between the gates of a dry dock, opening into a basin of the canal, and thus prevented navigation; and the superintendent, acting in good faith, and doing no more injury than the act required, destroyed the boat; and it appeared that other methods were practicable, and might have been adopted by him, without serious detriment to the public interests, which did not necessarily involve injury to the plaintiff's boat.—*Held*, the superintendent was liable for the value of the boat. *Id.*

SURETY.

1. The rule of interpretation applicable to contracts of suretyship restated and applied. *Hayden v. Crane.* 181

SURROGATE AND SURROGATE'S COURT.

See PRACTICE, 7, 8, 9, 10, 11.

SUSPENSION OF THE POWER OF ALIENATION.

See WILL, 1 to 7.

TAXATION OF COSTS.

See EXECUTORS AND ADMINISTRATORS, 4.

TAXES AND ASSESSMENTS.

1. An assessment for rents reserved in leases in fee (*L.* 1846, p. 466), must be made in accordance with the

requirements of the Revised Statutes, regulating the assessment of personal property. *Cruger v. Dougherty.* 464

2. The plaintiff, in an action of ejectment, proved title as one of the heirs of J. K., deceased, to the premises in dispute, being part of K. patent, in the town of K. The defendant claimed to show title out of the plaintiff, by proving a sale, made under an assessment to the latter, as such owner of an undivided interest in several leases in fee, which covered the premises and other lands in K. respectively. The assessment had been made under a description as follows: "The K. patent: J. K. and others, legal heirs of J. K., late of the city of New York, deceased, or their heirs and assigns for rents reserved in the town of K., in the county of D., &c."—*Held*, the assessment being to a person deceased, and others not named, or their heirs or assigns, and each rent not being specified, the same was void, and the defence failed. *Id.*

8. *Wheeler v. Anthony* (10 Wend., 346), distinguished. *Id.*

4. A sheriff's notice of the sale of lands under the warrant of a county treasurer, issued upon an assessment of rents reserved, &c., must describe the lands to be sold separately; and where the notice describes such lands as "all that certain piece or parcel of land, situated in the town of K., in said county of D., and known and described as the K. patent, and bounded as follows, &c.," there being several distinct leases of lots, in the patent, upon which the assessment is made, and other lands therein not leased, the notice is insufficient. *Per BALCOM, J.* *Id.*

See COMPTROLLER, 1.
MONEY PAID, 1.

TELEGRAPH COMPANIES.

1. Where the operator of a telegraph company contracts to send a telegram over his own line, and the

lines of other connecting companies he becomes the agent of each company assuming to forward the message, and they are thereupon severally liable (no partnership relation existing between them), upon the agreement as made by him. *Baldwin v. U. S. Tel. Co.* 125

2. So held, in an action against the last company on the route, for its failure to deliver a message to the proper address. *Id.*

3. In an action against an intermediate company, which has undertaken to forward the dispatch, it will be inferred in the absence of proof, that the charges established by its rules and regulations have been paid as provided in § 11, chap. 265, Laws 1848. *Id.*

4. The company, originally receiving the dispatch, and payment for the entire distance, thereby undertakes for its through transmission, and without special agreement limiting its liability, is responsible for a breach occurring at any point on the route. Per JAMES, J. *Id.*

5. Subject only to such modifications as the peculiar nature of their business renders absolutely necessary, the law regards telegraph companies as common carriers. *Id.*

6. The foregoing rules respecting telegraph companies, deduced from rules, applicable to common carriers, and the latter stated and discussed. *Id.*

7. A telegraph company can only limit its liability to the sender of a message by express agreement; mere notice of conditions, upon which it will guaranty accuracy, is insufficient. *Id.*

8. The damages recoverable, for a breach of contract to send a telegram, are such damages sustained, as the parties had opportunity to know, and should have expected, would be the probable loss entailed by the default. *Id.*

9. Where, in an action for breach of contract to send a telegram, the

defence is negligence of the plaintiff, the onus is on the defendant to allege and prove it. *Id.*

TENANT.

See GUARDIAN, 2, 3.

TENANT AT WILL.

See FORCIBLE ENTRY AND DETAINER, 5, 12.

TENANT BY THE CURTESY.

1. The husband's common law estate of tenancy by the curtesy is abolished in this State, in all the real property of the wife, affected by the married women's acts of 1848 and 1849. *Matter of Francis M. Winne, an infant.* 508

TENANT IN COMMON.

1. The trustees of a school-district, having possession of a school-house and being tenants in common with the plaintiff and others, of the lot upon which it stood, the plaintiff, while said trustees were absent, the premises locked, the keys in their possession, and the property of the district within, entered through a window and fastened the door against their entrance, and remained in possession; the trustees broke down the door and ejected her, whereupon she brought this suit to recover damages for the forcible entry, &c.—*Held.* *King v. Phillips.* 421

2. That the trustees were justified in ejecting the plaintiff, and the action would not lie. *Id.*

3. That the trustees having taken possession of the *locus in quo*, and being in the occupancy thereof, at the time of plaintiff's entry, their occupancy was good as against their co-tenants. *Id.*

4. That the possession of the plaintiff was inconsistent with a user of the property by the trustees; and her entry being made with the purpose to exclude, and followed by an exclusion of the trustees, such entry and occupation were unlawful. *Id.*

5. That the trustees, having been for some time in possession, with the acquiescence of the tenants in common, a license would be presumed in favor of their occupancy, and the plaintiff's remedy for possession, if any, was by action. *Id.*

6. It seems, an action may be maintained for the trespass by one tenant in common against another, who, being in possession, is put out of the same by such co-tenant. *Id.*

7. The decisions respecting the rights of tenants in common to hold and occupy the common property, as against their co-tenants, classified, and the rights of such tenants in each class stated. Per MULLIN, J. *Id.*

TREASURER.

See CANAL FUND, 1, 2, 3, 4.

TRESPASS.

See TENANT IN COMMON, 6.

TRIAL.

1. On a trial before a referee, the plaintiffs obtained an adjournment for the purpose, moved the court, had leave to serve, and served a reply to the defendant's counterclaim. It seems, a new hearing afterward, before the referee, was an adjournment of the former hearing, and the issues not being essentially changed by the reply, the referee might, in his discretion, refuse to allow a re-examination of witnesses *de novo*. *White v. Smith.* 469

See DEMURRER, 1.
DISCRETION, 1.
PRACTICE, 3, 4.
QUO WARRANTO, 3.

TRUST AND TRUSTEE.

1. An express, active trust of real estate may be invalid and void by the Revised Statutes, though it may not, if valid, unlawfully suspend the absolute power of alienation of the subject of it. *Manice v. Manice.* 343

See DEVISE AND DEVISEE, 3.
WILL, 1 to 5, 8, 9, 11 to 15.

VALUABLE CONSIDERATION.

See GRANTEE, 1.

VARIANCE.

See SUMMONS, 4.

VENDOR AND PURCHASER OF LANDS.

1. A party purchasing a title to real estate believed by himself and by his grantor to be doubtful, cannot recover back the consideration therefor, by showing that such title was in fact void. *Granger v. Olcott.* 169

2. His right to recover would be limited to a case, where the parties believing the title purchased to be good, were laboring under a mistake of the fact. *Id.*

3. A purchaser or mortgagee of lands, is presumed to have knowledge of every fact, to which he is led, by a deed forming a link in the chain of his title. *Acer v. Westcott.* 193

4. And he does not, in equity, escape from such presumption, because the fact to which he is referred, is

the existence of an equitable right, and not a legal one. *Id.*

5. W. took a mortgage from C., on premises to which the latter had title under a deed from B. wherein it was recited that: "This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part, for a conveyance thereof to one * * A., of whom the said party of the second part has become the assignee, or purchaser, and as such, entitled to a fulfillment thereof, by virtue of this conveyance; said contract being dated, &c."—*Held*, W. took his mortgage with presumptive knowledge of A.'s equitable right to a conveyance from B., and of the terms of the agreement between A. and C., upon which the latter's right to B.'s conveyance was founded. *Id.*

6. And the agreement between A. and C., being for a sale of the premises to which A. had the equitable title under his contract with B., and providing, that on conveyance C. should give a mortgage to B., on said premises, for a balance due from A., and as a next lien thereto, execute a purchase money mortgage to A.; and by means of a subsequent arrangement, for convenience of the parties (but not affecting the agreement between A. and C.), by which B. was to convey directly to the latter, C. obtained the deed from B., paying her the balance due from A. in money, and before complying with the terms of his agreement with A., executed the mortgage to W.—*Held*, W.'s mortgage should be postponed to A.'s equity. *Id.*

7. W. had loaned to C. the balance paid to B. on A.'s contract, for the purpose of such payment, and it was made part of the consideration of W.'s mortgage.—*Held*, no right to subrogation existed in W., by which his mortgage could be preferred to the extent of such balance over A.'s equity. *Id.*

8. The defendant conveyed land to the plaintiff, with warranty, "reserving always a right of way, as

now used, on the west side, &c., from the public highway to the piece of land now owned by R.," &c., and afterward quit-claimed to plaintiff his interest in said land; whereupon, plaintiff obstructed the way reserved. R. had a prescriptive title to the same right of way, and sued the plaintiff, and obtained judgment for damages on account of the obstruction, and for repossession, and was put into possession under the judgment; the plaintiff then brought an action, on the warranty, against the defendant, who, though duly notified, had neglected to defend the suit by R., for the costs and damages recovered in such suit.—*Held*, the covenant of warranty in defendant's deed covered the prescriptive right of R., and the possession of R. enforced under the judgment, was an ouster of plaintiff, and he was entitled to recover. *Bridger v. Pierson.* 481

9. The right of way was reserved, and not excepted by the deed, and could be construed as having been made for the grantor's benefit only. *Id.*

See FIXTURES, 1, 2.
GRANTEE, 1, 2.
JUDGMENTS AND EXECUTIONS, 6, 8 to 14.
NUIRANCE, 6, 7.
STATUTE OF FRAUDS, 1 to 5.

VENDOR AND VENDEE OF CHATTELS.

See MARRIED WOMAN, 1, 2, 3.
PRINCIPAL AND AGENT, 6.
SALE OF CHATTELS, 1 to 5.

VERDICT.

See FORCIBLE ENTRY AND DETAINER, 1, 3, 7.

VERIFICATION.

See EVIDENCE, 1, 2.

VOID AND VOIDABLE.

See INFANT, 1, 2.
MARRIED WOMEN, 1, 2.

WARRANTY.

See NUISANCE, 6, 7,
PRINCIPAL AND AGENT, 5.
VENDOR AND PURCHASER OF
LANDS, 8, 9.

WILL.

1. The residuary clause of a will gave the rest, &c., of the estate, real and personal, to executors in trust, to collect the income and apply the same, during the life of the testator's widow, to certain specified purposes; and upon her death, all said estate, except a house, of which it directed a sale, was to be appraised by three persons; one to be chosen by the executors, one by the surrogate of the county of New York, and a third by the persons so selected; and the aggregate amount of such appraisal, together with the proceeds of the sale of such real estate, and all other assets then belonging to the testator's estate, was to be divided into twelve equal parts, which were to be distributed as further provided. *Manice v. Manice.* 348
2. The said clause also provided for the conveyance and transfer of three of the twelfth parts to the testator's son, to whom said parts were given; or in case of said son's death, to his then living lawful issue; with the like provision for another son; and, also, in case of the death of either of said sons, prior to such division, leaving no lawful issue living at the time of such division, then the surviving son, or in case of his death, his lawful issue, to take the share of the deceased son. *Id.*
3. The said clause also provided that, as to two of the remaining twelfth parts of said residuary estate, the executors were to retain and hold

the same (and said parts were given and devised to them accordingly, and were to include certain specified real estate at the appraised value; the residue to be made up of personal estate at the appraised value), in trust to pay over the net income to the use of the testator's daughter during life; and after her death, or after the time of said distribution, in case she should have previously died, to divide the said two twelfth parts into as many shares as there might be children of said daughter living at her decease, and to retain one of said shares for each of said children, and accumulate the net income during the minority of such children respectively, and to pay the same to them at their majorities, with the accumulations, no further provision being made respecting the vesting of said shares in the event of the death of the testator's daughter before the division; with like provision for two other daughters respectively. *Id.*

4. *Held*, that the clause intending to vest the *corpus* of the residuary estate in the executors, as trustees to hold and carry from and after the death of the widow, to the time of the distribution, was *pro tanto*, void, as suspending the absolute ownership and power of alienation thereof beyond the period permitted by the Revised Statutes. *Id.*
5. That the gifts, to the testator's sons and to his sons' issue, were both contingent, neither of them being intended to vest before the actual division of the residuary estate, and that they were void in their creation. *Id.*
6. That the ulterior executory gifts of the other half of the residuary estate, were also contingent and void in their creation. *Id.*
7. That the directions for appraisal, division, conveyance, &c., could not be considered powers in trust for partition; but that the plain intent of the whole residuary clause was, that the executors should, on the testator's death, take, hold and carry the *corpus* of the residuary estate, until the directed division

of it and its directed or implied accumulations, after the death of the widow and after the directed appraisal should actually take place. *Id.*

8. The said clause also first provided for the disposition, by the executors, of the net income of the said residuary estate given to them in trust, after payment of annuity to the testator's widow and mother, in the payment of an annuity to each of the testator's children, during the life of said widow, and the application of the surplus to the *pro rata* payment of certain legacies bequeathed in previous clauses of the will; and if after such payment there should be a further surplus, the same was to be divided into two parts; one of which parts was to be invested and to accumulate during the life of the widow; and the other to be subdivided into eighteen parts, of which six were to go the widow; three to each of the testator's sons, and two to each of his daughters.—*Held*, that in addition to an unlawful accumulation of the one-half of such surplus during the life of the widow, the directions for payment of annuities to the testator's children during the widow's life, and for the payment to said children of the eighteenth parts of the surplus income (required also to be made during the life of the widow), no provision being made for disposition of the said children's annuities, and the said eighteenth parts, on the decease of said children, with or without issue, before death of the widow, until after the widow's death, were made in view of the whole clause, with the intention by the testator, that on the happening of the latter event (the decease of his children, with or without issue, before his widow), the said eighteenth parts of the surplus income appropriated to, and the said annuities of, said children, should fall under the provisions of the residuary clause, and accumulate until the distribution therein provided for. *Id.*

9. That if the trust were valid, as vesting in the trustees the residu-

ary estate till the death of the widow, as the testator's children might die before the widow, the testator's mother being dead, the trust might become a trust for receiving annually the income of the residuary estate, for the purpose of paying thereout the provisions for the widow, and for paying the remainder of the income to whoever might be entitled, on the theory that the testator had not made any valid testamentary disposition of it; as it could not be lawfully accumulated under the express and implied trusts for accumulation, and there was no person entitled, under the will, to any eventual estate in the subject of the trust to whom it could go under 1 R. S., 726, § 40. *Id.*

10. That the provision did not warrant the view that the testator intended, on the death of either daughter without issue, before the division, that his heirs-at-law should take any vested estate in said two-twelfths. *Id.*

11. And it seems, in case it had been provided, that on the decease of either of the testator's children leaving issue, before his widow, the trustees should apply, &c., or pay over to said issue thereafter, during the life of the widow, the like annuity and part of one-half of the surplus income, the child so dying had received, or was to receive; the trust could not have been held valid. *Id.*

12. It seems also, the trust to receive, &c., and pay over to the testator's children during the life of his widow was invalid. *Id.*

13. And assuming the purpose of the trust as to the widow to have been lawful and authorized; and whether the purpose of the trust for the testator's children were lawful or not; in view of the contingencies and difficulties, to which the feature of the trust scheme last mentioned exposed it, and its connection with the express and implied purposes of unlawful accumulations, the impossibility of saying that the trustees as such under the trust, as a trust vesting in them the whole

residuary estate during the life of the widow, could lawfully hold the whole of it, and receive the income of the whole of it, for the purpose of paying over a small part of the income to the testator's widow and children under the trust scheme, and the balance of it to the testator's heirs-at-law and next of kin, as undisposed of by him; and considering, also, the intended entirety of the *corpus* of the residuary estate during the life of the widow, and until the directed division of it with its accumulations; and the impossibility, without the exercise of arbitrary discretion, of determining as to what part or how much of the residuary estate the trust scheme should be deemed valid, as vesting an estate in trustees as such, *pro tanto*, for the lawful purposes of the trust during the life of the widow; and considering the invalidity and voidness of the ulterior and executory dispositions of the residuary estate, with its accumulations, with a view to which ulterior and executory dispositions it was to be presumed the first part of the trust scheme during the life of the widow, with its express, and implied trusts, for accumulations of income, was framed.—*Held*, the whole trust scheme must fail, and in respect to his residuary estate, which the testator intended to dispose of by such residuary clause, he must be deemed not to have made any valid testamentary disposition thereof, or of its accumulations, unless the intended disposition and purposes could be carried out, through or by the execution of the trust directions or powers, viewed only as powers in trust. *Id.*

14. *Held*, further, that the trust provisions, so far as they might be considered powers in trust, failed also. *Id.*

15. *Held*, further, that notwithstanding the failure of directions to pay them out of the income of a certain portion of the testator's estate, general legacies bequeathed in previous clauses of the will, were payable out of the general assets in the hands of the executors as

executors; and that a bequest expressly payable out of the trust residuary estate, on the death of the widow, did not abate by the failure of the trust scheme, and might be viewed as a general pecuniary legacy, and paid, or its payment, on the death of the widow might be provided for, out of the general assets; and so, also, taxes, &c., on premises given to the widow for life; but otherwise, as to the annuities, and further gifts out of the income of the trust residuary estate, which were presumptively given on the theory that the testator supposed he was making valid disposition of all his residuary estate. *Id.*

16. *Held*, further, that the widow's annuity having abated, any election by her to take the provisions of the will in lieu of dower, should not impair or affect her right thereto in the residuary real estate. *Id.*

See DEVISE AND DEVISEE, 1, 2.

WITNESS.

1. A prisoner under sixteen years of age, convicted of burglary in the third degree, is liable to imprisonment in a state prison, and disqualified until pardoned, to testify as a witness. *Park v. The People.*
2. So held, where the prisoner had been sentenced, after conviction, to the house of refuge in New York city. *Id.*
3. And it seems the statutes, which provide for imprisonment of convicts in a house of refuge, do not relieve them from the disability to testify, which attaches under 2 R. S., 701, § 28. *Id.*

See EVIDENCE, 3, 4, 6, 7, 8, 9.

WRONG DOER.

See HUSBAND AND WIFE, 1, 2, 3.

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